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UNION OF SOUTH AFRICA.

SELECTED DECISIONS

OF THE

NATIVE APPEAL COURT

(TRANSVAAL AND NATAL)

1932.

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CASE NO. 1.

TOBIAS SIBIYA VS. SAMUEL SIBIYA.

DURBAN. 15th January, 1932. Before E.T. Stubbs, President, E.N. Braatvedt and J.T. Braatvedt, Members of Court.

NATIVE APPEAL CASES - Inheritance - Primogeniture in Native Law - Allocation of daughters' lobolo to sons.

An appeal against the decision given in an enquiry held by the Native Commissioner, Kranskop, under Section 3(3) of Government Notice No. 1664 of 1929.

IT IS COMPETENT FOR A KRAALHEAD TO ALLOCATE TO HIS YOUNGER SONS THE LOBOLO TO BE RECEIVED IN RESPECT OF HIS DAUGHTERS. THE PLACING OF A YOUNGER SON OF ONE HOUSE INTO ANOTHER HOUSE DOES NOT GIVE HIM THE RIGHT TO INHERIT THE PROPERTY ON FAILURE OF MALE ISSUE IN THAT HOUSE, WHERE NO PUBLIC DECLARATION TO THAT EFFECT HAS BEEN MADE. THE ELDEST SON OF THE FIRST WIFE MARRIED IS TO BE REGARDED AS THE GENERAL HEIR IN HIS FATHER'S ESTATE PROVIDED THAT HE HAS NOT BEEN FORMALLY DISINHERITED IN MANNER LAID DOWN BY THE CODE OF NATIVE LAW.

This is an appeal from the judgment of the Native Commissioner, Kranskop, who held an enquiry under the provisions of paragraph 3(3) of Government Notice No. 1664 framed under Section 23 of Act 38 of 1927 in connection with a dispute which had arisen in regard to a portion of the estate of the late Samson Sibiya.

Samson Sibiya first married Paulina Goke, and by her had the following children, viz:- (1) Emelia (girl), (2) Samuel (Respondent), (3) Sem (boy), (4) Jeremiah (deceased), (5) Tobias (Appellant), (6) Sizegile (girl), (7) Tabita (girl), (8) Ida (girl).

Paulina died and Samson thereafter married again. His second wife was named Nobuti Lushozi. By her he had the following children, viz:- (1) Otilia, (2) Lina, (3) Lisa, (4) Sipiwe, (5) Jabulile - all girls, and (6) Jonathan who predeceased his father.

Samson allocated the lobolo on the girls of the first marriage as follows:-

No. (6) Sizegile's lobolo was given to Respondent Samuel, No. (7) Tabita's lobolo was given to Sem, and No. (8) Ida's lobolo was given to Appellant. The lobolo received on the eldest girl of the first marriage (Emelia) was used by Samson to lobolo his second wife, and a small balance left over from that lobolo was given to Respondent. Appellant admits that he was given Ida's lobolo, but states that his father used some of the cattle, and that he received only two head. He states that Ida's husband still owes cattle for her. When they are paid they will come to him.

In regard to the girls of the second marriage only the eldest Otilia married before the death of Samson, who received the lobolo (6 head). The ownership of these cattle is included in the dispute between the parties to this action.

The girls Lina and Lisa (Nos. 2 and 3) have married since the death of Samson, and the Appellant claims that he is entitled to their lobolo. The other girls of the second marriage are still unmarried, and live with their mother close to the kraal of the Appellant. Respondent lives on a farm which was owned by Samson and which he alleges that he inherited from him.

Samson .....

Samson died in 1928, and his son Jonathan by his second marriage predeceased him six years earlier. It is, therefore, 9 or 10 years since Jonathan died. Before his death a dispute arose between Respondent and his father Samson over the lobolo of the girl Emelia. At the invitation of the Rev. J. Astrup the family held a meeting in his presence to settle matters. It is what was said at that meeting that gives rise to this action. There is no written record of what was said. Respondent denies that there was such a meeting, but there is no doubt that it was held because several witnesses (including the Rev. Astrup) give evidence on the point. It was at that meeting that Samson allocated the different girls' lobolo to his three sons by his first marriage. The Rev. Astrup states that Samson was most annoyed with Respondent, and wished to disinherit him, but that he persuaded him not to do so. Appellant alleges that Samson said that he was taking him (Appellant) out of the first house and putting him in the second house as if he were a child of that house. The Rev. Astrup states that Appellant was placed in charge of the second house, and that he distinctly understood that he took his place in the second house as if he were a son of that house. He states that, in his opinion there could be no doubt in the mind of any reasonable person as to the purport of the old man's wishes declared at the meeting.

Sem states that Samson took Tobias out of the first house and put him in the second house on the understanding that he was to be considered as a son of the second house. He further states that he understood that Tobias would return to the first house on attainment by Jonathan of his majority. Appellant admits that if Jonathan had lived he (Appellant) would not have received anything out of the estate of the second house.

It must be remembered that the meeting was held while Jonathan was alive, and therefore it must have been at least 9 or 10 years ago, so that in the absence of some written record of all that was said it would be very difficult for those present to remember all details. The Rev. Astrup for example, states that there was no mention of the farm, whereas Sem states that Samson said that the farm would be divided between the three brothers of the first house.

Appellant claims that, by virtue of what Samson said at that meeting he was from that time regarded as the younger brother of Jonathan of the second house, and that as Jonathan has died he steps into his shoes, and inherits the estate of the second house. That estate is considerable, consisting of property rights in five girls.

Respondent contends that on the death of Jonathan he, as the eldest son of the first marriage, and as general heir to his father, inherits the property rights of the second house which has no male issue.

At the time of the meeting Jonathan was alive. Appellant was given the lobolo of one of his own sisters by the first marriage. He was treated similarly to his two brothers Respondent and Sem, who each received the lobolo of one girl. If the intention had been to take him out of the first house, and to regard him as a son of the second house it is difficult to understand why he was given the lobolo of a girl of the first house. It is not contended that he was allocated the property rights in any girl of the second house. That house had an heir, namely, Jonathan.

Appellant .....

Appellant could not, therefore, have been appointed heir to that house while the rightful heir lived. After the death of Jonathan Samson made no further reference to the matter. It is not alleged that Samson said that Appellant should succeed Jonathan in the event of the death of the latter, but the witness the Reverend Astrup states that there could be no doubt that such was the old man's intention and wish. It is an inference drawn from the fact that Appellant was placed in the second house.

The Respondent was not disinherited for the procedure laid down in the Code of Native Law in such cases was not complied with. He is the eldest son of the first wife, and therefore the general heir. Section 100 of the Code states that the heir to house property is the eldest son of that house. The heir to the second house in this case was Jonathan, but on his death that house was left without an heir. The Respondent, in the natural course of events, would then be the heir to the second house, but in this case his younger brother claims that he is the heir because of the expressed wish of his father.

It is undoubtedly competent for a father to allocate the property rights in certain girls to younger sons. Appellant does not claim that he would have been entitled to any of the lobolo of Jonathan's sisters had Jonathan lived. There was therefore no special allocation. In any event there was no lucid and clear statement by Samson as to exactly what he meant when he said that he was placing Appellant in the second house. Possibly he merely meant that Appellant was to be Jonathan's guardian during his minority. That was what the witness Sem understood him to mean. This view is confirmed by the gift of lobolo cattle to Appellant from one of his sisters of the first house.

The Appellant has failed to prove that he is entitled to oust the general heir (Respondent) from his legal position.

In dismissing the appeal with costs, it should be added that in connection with the application of Mr. Buss that costs in the appeal should be met from the estate that as the late Samson (the father of the parties) was responsible for the position which led the Appellant to believe that he was entitled to the property rights in the daughters of the second house which formed the subject of the enquiry by the Native Commissioner whose decision has been brought in review before this Court by the Appellant, he should not now, even though unsuccessful, be mulcted in the costs of this appeal. In the circumstances, it would be equitable that costs be met out of the estate and it is ordered accordingly.

CASE NO. 2.

MONDILE SIBIYA VERSUS MBEKI MTEMBU.

DURBAN. 18th January, 1932. Before E.T. Stubbs, President, E.N. Braatvedt and J.T. Braatvedt, Members of Court.

NATIVE APPEAL CASES - Customary union - Application for divorce dismissed - Leave to renew at later date - Native Commissioner's ruling set aside - Divorce granted.

WHERE.....

WHERE A PRIMA FACIE CASE HAS BEEN MADE OUT, AN ORDER THAT THE CLAIM BE DISMISSED WITH LEAVE TO RENEW AT A LATER DATE IS NOT A COMPETENT JUDGMENT.

This is an appeal from the decision of the Native Commissioner, Mtunzini, who refused to grant Applicant's prayer for a divorce.

The grounds of appeal are the following:-

"1. That the finding of the Native Commissioner is against the weight of evidence and of fact.

"2. That the evidence of Plaintiff's witnesses and of the fact that Plaintiff had done all in her power to effect a reconciliation with the Defendant, should have been accepted by the Native Commissioner and that judgment as prayed by Plaintiff should have been granted".

The judgment of the Native Commissioner reads "Application refused, with leave to renew in 12 months time if necessary. Plaintiff ordered to return to Defendant forthwith".

This finding the Native Commissioner - in his reasons for judgment - qualifies by saying: "There is ground for the Court to believe that all is not as it should be between the parties, but in face of Defendant's persistent opposition to the divorce when he could easily get rid of an unsatisfactory wife by not opposing the proceedings, it was thought that the interests of justice would be best served by dismissing the application for the present but with leave to renew in 12 months time; in the meantime ordering the Plaintiff to return to her husband forthwith, which incidentally she refuses to do. The matter can then be considered afresh, the present record be put in, and a final judgment obtained".

In effect his finding is tantamount to an adjournment sine die. He dismisses the application "for the present" as he puts it. Is it to be deduced therefrom that Applicant (now Appellant) has made out a prima facie case but is not to be heard for another 12 months, and in the meantime is ordered to return to her husband as a test in regard to her future behaviour? It would seem that none other but a judgment decisive of the issue was competent.

The Native Commissioner was undoubtedly influenced in favour of the Defendant (Respondent). This is evidenced by the following remarks in his reasons: "..... but in the face of Defendant's persistent opposition to the divorce when he could now easily get rid of an unsatisfactory wife by not opposing the proceedings ....." He overlooks the fact that the underlying motive for Defendant's opposition may have been conceived in the knowledge that failure to oppose may have involved him in the loss of a few head of cattle. This I think is a fair inference to be drawn from what Jipaza (tribal Policeman of the late Chief Sisila) says in evidence - "the Chief called the parties together and, after going into the matter, ordered the Plaintiff (Appellant) to return to her husband, which she did, and shortly afterwards she again complained to the Chief that she had been turned away from her husband's kraal, whereupon the Chief advised her to go and live at 'her people's kraal', and wait for her husband to come and fetch her." In the meantime Sisila died. Some considerable time after his death Appellant went to Jipaza and stated that the position had

not altered and he then referred her to the acting Chief Muzitshingiwe. The evidence fails to disclose the outcome of the reference to the Acting Chief Muzitshingiwe.

In evidence Jipaza frankly admits that the late Chief Sisila, although Appellant went to him on two occasions, did not think it necessary on the second occasion to call upon the husband to answer the complaint, because he had already given his decision. Stated otherwise, he found the complaint of the Appellant well founded. This witness, a disinterested party, gave the following reply, inter alia, to a question in his cross-examination by Defendant: "Had you not have chased your wife away you would have gone to the Chief with a complaint yourself, and he would have ordered her to go back to you."

He certainly struck the nail on the head, because if the Respondent (husband) had had a real grievance against the Appellant he would have been only too ready to proclaim it from the house tops to make sure of the recovery of lobolo.

The evidence clearly establishes that Appellant proved her case, inasmuch as her evidence is supported by the tribal Policeman Jipaza, whose testimony goes to show that the Respondent was actually the defaulting party.

The appeal is upheld with costs and the judgment of the Native Commissioner is altered to read "Divorce granted with costs. No order for the return of cattle; the child of the union, being of tender years, to remain in the custody of the mother till further order."

CASE NO. 3.

MADEVU QWABE VS. MATAMBO QWABE.

DURBAN. 19th January, 1932. Before E.T. Stubbs, President, E.N. Braatvedt and J.T. Braatvedt, Members of Court.

NATIVE APPEAL CASES - Lobolo - Section 230 of Schedule to Law 19/1891 Liability of Estate of deceased.

An appeal from the decision of the Native Commissioner at Empangeni.

A GIRL CANNOT HERSELF BE PLEDGED FOR THE RETURN OF CATTLE LENT, BUT MERELY THE RIGHT TO LOBOLO WHICH MAY BE PAID IN RESPECT OF HER. ON HER MARRIAGE THE DEBT RESTING UPON THE HOUSE TO WHICH SHE BELONGS BECOMES DUE AND MUST BE DISCHARGED BY PAYMENT, WAIVER, OR IN OTHER LEGAL MANNER.

At the time Nukani Qwabe married his wife Betukile, he was assisted by his half-brother, Madevu Qwabe (Appellant) with lobolo cattle. It is averred by Appellant that he provided five head for this purpose and that he also lent Nukani another eight head at various times. The Respondent, son and heir of Nukani who died some years ago, admits that his late father borrowed cattle from Appellant, but states that four and not five were obtained for lobolo purposes for Betukile (his mother) and that his father

borrowed another seven, not eight, head at different times. The discrepancy in numbers is not material as will be shown. It would appear that Nukani arranged with Appellant that the cattle he had borrowed should be returned from cattle to be obtained as lobolo for Makolwase, the eldest daughter of Betukile. Makolwase married during Nukani's lifetime, but only two head of cattle and monies amounting to £7 were given as and for lobolo for her. The two head were, however, returned to the husband by Nukani who was then ill. The record is silent as to the reason for this unusual procedure and there is no evidence as to the disposal of the £7. Nukani was then alive and it must be presumed that he received the money. The Respondent states that appellant received the amount, but there is no proof of this and the onus is upon him to prove that his father passed on the money to another.

Nomhau, a younger sister of Makolwase, thereafter married, and full lobolo was given for her; but it would appear that the delivery of the cattle did not take place until immediately after Nukani's death. Appellant fetched them on the instructions of his dying brother, Nukani, whose directions in the matter - given on the afternoon of the day he died - were that one of the cattle was to be given to his son Matambo (Respondent) as the "Inhloko" beast and that the other cattle were to be taken by Appellant in payment of the cattle due to him. After allotting the "Inhloko" beast as directed, Appellant took possession of the cattle, using one beast in connection with the obsequies of his brother (Nukani), and paying another to a doctor who attended Nomhau. There is no record of any protest having been made by Respondent or his people against the taking of the cattle by Appellant, in whose possession they have been ever since. After the lapse of seven or eight years the Respondent instituted an action in the Court of the Chief Muziwenduku who awarded him a judgment on the grounds that Makolwase "had been given"to Appellant, who gave her away in marriage, and received her lobolo. The Chief's judgment was taken in appeal to the Court of the Native Commissioner, Empangeni, who ordered "that the appeal be and the same is hereby dismissed with costs." This appeal is against that judgment.

The Chief's reasons for judgment are clear. His conclusion is that the liability was discharged by payment of the girl Makolwase herself as if she were so much goods to be disposed of. Section 230 of the Code of 1891 forbids this. The Native Commissioner confirmed the judgment of the Chief. In the case of Nsizwana vs. Vovo (1903 N.H.C. 32) the following questions were reserved for the decision of the Full Court viz:-

> "Is the handing over of a girl in connection with a debt its security or its satisfaction?
>
> "Is she regarded by the Natives as a pledge, or does she become the property, and pass into the possession of, the creditor?
>
> "Should such a transaction, whether it be treated as the giving of security, or as effecting an actual settlement, receive the sanction of this Court, or be regarded as valid under the Law as now administered?"

The Court ruled that "whether given as security or satisfaction of a debt, the transaction is illegal". Clearly the girl Makolwase was not herself given or pledged, but only the prospective rights to her lobolo and the debt became due and payable on Makolwase's marriage. This debt can only be discharged by payment, waiver, or in any other legal manner, and is undoubtedly due by the estate of the late Nukani (Respondent's father): Nomhau's lobolo was estate property.

It would seem that Appellant only received seven head of cattle of Nomhau's lobolo, for presumably the Ingqutu was taken by her mother; the "Inhloko" was given to Respondent in terms of his father's dying declaration; one beast was used in connection with the customary burial ceremonies; and another was paid to a doctor who attended Nomhau. But Appellant appears to have accepted the cattle in full settlement of the number, either eleven or thirteen head, he had lent to his late half brother, Nukani.

The appeal is sustained with costs and the judgment of the Native Commissioner set aside.

CASE NO. 4.
MAGANGENI NJOKO VS. MADODA MAJOLA

DURBAN. 20th January, 1932. Before E.T. Stubbs, President, E.N. Braatvedt and J.T. Braatvedt, Members of Court.

NATIVE APPEAL CASES - Abduction - Proviso to Section 211 of Schedule to Law 19/1891 - Betrothal visit - Proposed marriage.

An appeal from the decision of the Native Commissioner at Estcourt.

WHERE NO FORMALITIES HAVE BEEN GONE THROUGH AND THE CONSENT HAS NOT BEEN OBTAINED OF THE PARENT OR GUARDIAN OF A GIRL ABDUCTED WITH A VIEW TO MARRIAGE, THE ABDUCTOR CANNOT BE HELD TO BE A "PROPOSED FUTURE HUSBAND", (SECTION 211 CODE OF NATIVE LAW) AND DAMAGES PAID FOR THE ABDUCTION CANNOT BE REGARDED AS HAVING BEEN PAID IN RESPECT OF LOBOLO

(Note. But see Section 137 of the revised Code in force from 1.11.32. which provides that in the event of the seducer marrying the woman payments other than the Ngqutu beast made in respect of the seduction shall now be regarded as forming part of the lobolo.)

The Appellant (Magangeni) who was the Plaintiff in the Court of the Native Commissioner, Estcourt, claimed from Respondent the return of the sum of eleven pounds (£11) which he alleged he gave as and for lobolo for a girl, Nomaplums, who jilted him and married one Amos Dhlamini. The defence set up was that Nomaplums was abducted on the eve of her proposed marriage to Amos Dhlamini and that the amount paid was for damages. The Native Commissioner gave judgment for Respondent (Defendant in his Court). This is an appeal against that judgment.

// The Appellant

The Appellant is a Native of the Impendhle District while the Respondent and his ward Nomaplums, reside in the Estcourt District.

Appellant's own evidence is that he "ran away with Nomaplums". It would appear that he met her at a stream near her home when she went out early on the morning of the 15th June, 1931, to fetch water and that he carried her off from there. They travelled to Pietermaritzburg by train the same day and continued to Appellant's kraal. Appellant states he then communicated with her people and acquainted them of the position. Mapoyiseni, who was Nomaplums' kraalhead, accompanied by two followers then proceeded to Appellant's home where they demanded the return of the girl and the payment of damages. It is alleged that Appellant's father agreed to send eleven pounds (£11). These men returned to Estcourt without the girl, but her mother later fetched her. Appellant thereafter sent one Matole Madhlala to the girl's people with eleven pounds (£11). It is common cause that this amount was paid to Mapoyiseni.

The Appellant's contention is that as he immediately advised the girl's people of her whereabouts, proposed marriage and offered lobolo, the taking of the girl under the circumstances referred to was not wrongful and that the money paid - i.e. £11 - was in respect of lobolo. His Counsel at the trial quoted the case of Mpoyana vs. Ngoti 1914 N.H.C. 54, in which a claim for the return of lobolo paid on account was resisted on the grounds that Appellant had eloped with Respondent's daughter and that the cattle were paid in satisfaction of damages it being held that Respondent's allegations were without foundation as it was clear that his sister's presence at Appellant's kraal was nothing more than a betrothal visit as contemplated by Section 277 of the Code, the provisions of which had been complied with. In that case the engagement was sanctioned by the father or guardian of the woman who received money and goats on account of lobolo through the Umkongi and it was not till the woman jilted her prospective husband that the defence set up against the claim for the return of the lobolo was that the money and goats were paid as damages. The allegation, furthermore, that the woman was abducted and that the payments represented damages was uncorroborated. But this case is governed by Section 211, which reads as follows:-

> "Any person abducting the wife, child, or ward of another, or inducing the wife, child, or ward of another to leave her kraal without the consent of her husband, father, or guardian, shall be liable in civil damages to the husband, kraalhead, or guardian of the person so abducted or induced to leave: Provided that no action will lie, if the absence is only in connection with a betrothal visit of a girl, to the kraal of a proposed future husband."

The Appellant was not a "proposed future husband: he had not, on his own admission, proposed marriage, nor had he obtained the necessary consents or gone through the customary formalities attending such an event before he abducted the girl. He clearly failed to bring himself within the terms of the proviso to the Section quoted.

Moreover, the evidence makes it perfectly clear that the conduct of the girl's people throughout negatives the suggestion that there had been any acquiescence on their part.

/ These

These are important distinguishing features from the case relied upon by Appellant's Counsel.

The record shows that the girl's people expended a considerable amount of money in bringing her back from Appellant. Their disbursements in railway fares alone amounted to seven pounds and ten shillings (£7.10.0). In arriving at the amount of eleven pounds as the measure of damages the Native Commissioner has done substantial justice and we are not disposed to say that the amount is excessive.

The appeal is dismissed with costs.

CASE NO. 5. 1946 (T & N) 52.

FIXI ZULU VS. SINQOTOLO MNCWABE.

DURBAN. 20th January, 1932. Before E.T. Stubbs, President, E.N. Braatvedt and J.T. Braatvedt, Members of Court.

NATIVE APPEAL CASES - Custom of "Ukusisa" - The "Isisinga" beast - Section 231 of the Schedule to Law 19 of 1891 - Depositary barred under "ukusisa" custom from claiming remuneration.

An appeal from the decision of the Native Commissioner, at Polela.

A DEPOSITARY UNDER A CONTRACT OF "SISA" CANNOT CLAIM REMUNERATION AS OF RIGHT, AND IN ACCOUNTING FOR THE CATTLE THE ONUS RESTS UPON HIM OF SHOWING THAT A BEAST ("ISISINGA") HAS BEEN GIFTED TO HIM IN RESPECT OF HIS CARE OF THE "SISA" CATTLE.

Owing to the restrictions placed upon the movement of cattle under the East Coast Fever Regulations the Appellant (Fixi) was unable to bring a number of cattle he had acquired to his kraal. He overcame the difficulty, however, by placing them in the kraal of Respondent (Sinqotolo) who lived in another location; but removed them - except two head - as soon as the restrictions were relaxed and he was able to take them to his own kraal. The two head he left with Respondent remained under the custom of "Ukusisa". These two head and their increase are the subject of the dispute between the parties. The appellant (Fixi) claimed their return, and also that of one head increase, in the Court of the District Headman, Mpengwana. The Respondent's case was that Appellant had allowed him one of these cattle as an "Isisinga" beast and that the other and its increase were paid by Appellant himself to a Native Doctor, Ngeje Pungula, for professional services. It is alleged that the "Isisinga" beast and the heifer paid to the doctor have each had a calf since the proceedings were first instituted, thus increasing the number of cattle claimed to five head in all. The Headman gave judgment for Respondent (Defendant in his Court). The matter was then taken in appeal to the Court of the Native Commissioner, Polela (Bulwer), who dismissed the appeal and confirmed the judgment of the District Headman.

/ A depositary

A depositary under a contract of "Ukusisa" is barred from claiming remuneration, but Section 231 of the Code of 1891 declares it to be customary for an owner of such cattle to gift a beast occasionally from the increase. Clearly, then the onus was upon the Respondent to substantiate his allegation of the gift of the heifer in dispute. The Native Commissioner found that the evidence for Respondent sufficed to establish the allegation. The weight of evidence supports this view and the probabilities of the case, having regard to the circumstances under which the cattle were sisaed, favour Respondent's case.

With regard to Respondent's assertion that the second beast and its increase (now two head) were paid to the doctor, Ngeje Pungula, by Appellant himself for professional services rendered to his (Appellant's) family, the evidence supports Respondent's case. He did not derive any benefit whatever from the handing over of the beast to the doctor: he did so on Appellant's directions and Appellant admitted that the doctor did attend his family although he avers that a cure was not effected. The doctor, it would appear, took delivery of the heifer and disposed of it.

The questions as to whether or not the one heifer was given as an "isisinga" beast and the other in payment to the doctor belong to the domain of fact, and depend upon the credibility of the witnesses only.

The Native Commissioner, in a careful judgment confirming the award of the District Headman, has set out the reasons for his finding. He had the witnesses before him and was in a position to judge their credibility, and we find no grounds upon which the appeal can succeed.

The appeal is dismissed with costs and the judgment of the District Headman given herein is confirmed, without prejudice to any claim the Appellant may wish to institute against the doctor Ngeje Pungula in view of his allegation that a cure was not effected as a result of the services rendered to Appellant's family.

CASE NO. 6.

LILY NXABA, N.O. VS. CHARLES LENTALIUS DUBE, N.O.

DURBAN. 21st January, 1932. Before E.T. Stubbs, President, E.N. Braatvedt and J.T. Braatvedt, Members of Court.

NATIVE APPEAL CASES - Native law and custom - Enquiry into a dispute between executors of an Estate - Native Commissioner's jurisdiction under Section 10 of Act 38 of 1927 - Regulations under Government Notice No. 1664 of 1929, Rule 3 Sub-sections (1) and (3) - Appeal upheld.

An appeal from the Court of Native Commissioner, Lower Tugela.

A DISPUTE BETWEEN THE EXECUTRIX OF THE DECEASED ESTATE OF A NATIVE EXEMPTED FROM THE OPERATION OF NATIVE LAW BY ACT 28 of 1865 (N) AND THE REPRESENTATIVE

/ APPOINTED

(APPOINTED BY THE NATIVE COMMISSIONER UNDER SECTION 4 OF GOVERNMENT NOTICE NO. 1664 OF 1929) OF THE JOINT ESTATE OF THE SAME NATIVE AND HIS FORMER WIFE CANNOT BE DEALT WITH BY A NATIVE COMMISSIONER UNDER SECTION 3(3) OF THE REGULATIONS PUBLISHED UNDER GOVERNMENT NOTICE NO. 1664 of 1929.

George Nxaba, a Native exempted from the operation of Native Law, many years ago married a woman named Nomagugu who was also exempted, and of this union children were born. Nomagugu died in 1893. In 1897 George Nxaba re-married and in 1928 died. His second wife Lily Nxaba survives him, is the Executrix of his Estate, and the Appellant in this matter.

When Nomagugu - the first wife - died, no steps were taken to wind up the joint Estate, but on the 8th July, 1931, the Native Commissioner of Stanger appointed the Respondent, C.L. Dube, to administer it.

Dube published notice to the creditors, and advised tenants on various properties, alleged to belong to the joint estate, that rents were to be paid to him. He found, however, that Lily was collecting the rents. His legal adviser thereupon wrote to Lily informing her that the joint Estate of Nomagugu and George Nxaba covered the Estate which she was administering, and that the correct procedure was for Dube to collect all rents and other income, and thereafter to account to her for the share due to the Estate which she was administering. Lily's legal adviser replied that she did not recognize the right of Dube to collect any rent, and that any attempt on his part to do so would be resisted. In view of the dispute which had arisen the Native Commissioner issued summons under section 3, sub-section 3 of the Regulations published under Government Notice No. 1664 of 1929, and after taking evidence made the following order:-

(1) That the Estate received by Lily Nxaba as Executrix Testamentary under the will of the late George Nxaba is the joint Estate of George Nxaba and the late Nomagugu.

(2) That Charles Tentallus Dube, in his capacity as Executor in the joint Estate of the late Nomagugu and her surviving spouse George Nxaba, is entitled to one half of the said Estate, together with one half of all profits and accumulations resulting from its administration.

(3) That the said Lily Nxaba be and she is hereby directed on or before the 2nd January 1932 to furnish a full and true account of the said Estate and of the administration as at the date of the summons, with vouchers, documents and all relative papers.

(4) That on the amount being ascertained, it be reported to the Court for further order in terms of the judgment.

(5) Costs of this action of all parties are to come out of the Estate.

/ Against

Against this judgment the Appellant appeals on the ground that the summons issued by the Native Commissioner was incompetent, and that he had no jurisdiction to determine any question in the Estate of Nomagugu under Regulation 3(3) of the Regulations framed under the provisions of sub section 10 of section 23 of Act 38 of 1927.

The administration of Native Estates is governed by Section 23 of Act No.38 of 1927. Sub section (1) of that section provides that all movable property belonging to a Native and allotted by him or accruing under Native law or custom to any woman with whom he lived in a customary union, or to any house, shall upon his death devolve and be administered under Native law and custom, and sub section (2) provides that all land in a location held in individual tenure upon quitrent conditions by a Native shall devolve upon his death upon one male person, to be determined in accordance with tables of succession to be prescribed under sub section (10).

Sub section (10) empowers the Governor-General to make regulations prescribing the manner in which the Estates of deceased Natives shall be administered and distributed.

Regulations framed under sub section (10) were promulgated under Government Notice No.1664, 1929. Paragraphs (a) and (b) of section (2) of the Regulations provide that if the deceased was at the time of his death the holder of letters of exemption, or if he had during his lifetime contracted a marriage in community of property or under antenuptial contract, the property shall devolve as if he had been a European. Paragraph (d) of Section (2) provides that if the deceased does not fall under the classes described in paragraphs (a) and (b) the property shall be distributed according to Native law and custom.

By sub section (2) of section (3) of the Regulations the Native Commissioner is empowered to institute an enquiry in cases falling within the purview of sub section (1) or sub section (2) of Section 23 of the Act or of paragraph (d) of section (2) of the Regulations, and sub section (3) of the same section explains how such enquiry shall be conducted and determined.

The matter before the Court is clearly one which does not fall within the purview of sub sections (1) or (2) of Section 23 of the Act, or of paragraph (d) of Section (2) of the Regulations, and Respondent's counsel frankly admits that fact, but argues that, although the Native Commissioner was technically wrong in issuing summons under Sub section (3) of Section (3), he nevertheless was empowered by Sub section (1) of Section (3) of the Regulations to deal with the matter in the manner in which it was dealt with, and that the technical mistake made was insufficient to invalidate the proceedings.

Sub .....

Sub section (2) of Section (3) clearly defines the cases in which the Native Commissioner can issue Summons under sub section (3). If the same procedure could be adopted in all cases there would be no object in defining only some of them, and it is, therefore, clear that the Regulations do not contemplate that any but the cases referred to shall be dealt with in this manner.

Section (3), sub section (1), on which the argument is based, provides that all the property in any estate falling within the purview of paragraphs (a) and (b) of Section (2) of the Regulations shall be administered under the supervision of the Native Commissioner who shall give such directions in regard to the distribution thereof as shall to him seem fit, and shall take all steps necessary to ensure that the provisions of the Act and of the Regulations are complied with. It only provides for supervision in the administration, and makes no provision for settling disputes between Executors. Under Section (2) of the Regulations it is provided that the property in such cases shall devolve as if the deceased had been a European. It is quite clear that the Native Commissioner's powers to take the action which was taken in this case are limited to Estates which are administered under Native law and custom. If the Respondent is hampered in his administration of the joint Estate he must take other steps to safeguard his interests.

The appeal is upheld with costs, and the Native Commissioner's judgment set aside.

CASE 7. 1938 (T & N) 37, 265
1943 (") 57.

NGETSHANA KUMALO VS. MKITSHWA KUMALO.

DURBAN. 21st January, 1932. Before E.T.Stubbs, President, E.N.Braatvedt and J.T.Braatvedt, Members of Court.

NATIVE APPEAL CASES - Custom of "Etula" - Law of primogeniture amongst Natives - Succession and Heirship - Boys not "etulaed".

An appeal from the decision of the Native Commissioner at Pinetown.

THE CUSTOM OF "ETULA" DOES NOT APPLY TO MALE CHILDREN, IN WHOM NO PROPERTY RIGHTS CAN BE ACQUIRED.

The Respondent (Mkitshwa) as the eldest son and heir of the late Sakaza, who was the Inhdlunkulu eldest son and heir of the late Manekwana, sought an Order of Court declaring him to be the heir to the estate of the late Nqaka, the younger full brother of his father, who died heirless.

The .....

The Appellant (Ngetshana) who is a son of Manekwana's third wife, claimed:-

(a) That Sakaza was translated to Manekwana's brother, Bodhloza, who, he alleged, helped Manekwana with lobolo cattle.

(b) That Nqaka thus became the heir of the late Manekwana's Indhlunkulu.

(c) That he (Appellant) was transferred from his mother's house and given or allotted to Nqaka as his brother.

(d) That as Nqaka's alloted brother he was entitled to succeed to the estate of Nqaka who had no son.

The action was instituted in the Court of the Native Commissioner, Stanger, but by consent of the parties, was transferred to the Court of the Native Commissioner, Pinetown, who granted the Order applied for. This appeal is against the finding.

In his summons the Respondent, who was Plaintiff in the lower Court, also claimed the delivery of all goods and chattels in the estate of the late Nqaka presently in the possession of Appellant, but the Native Commissioner directed the enquiry solely to the question as to who was the heir of the late Nqaka. It would appear that Respondent's counsel during the trial challenged the legality of the grounds relied upon by Appellant as disclosed in his evidence, and that the Native Commissioner supporting Counsel's submission gave his decision upon the exception only, and not on the merits of the case.

The Appellant failed to prove that Manekwana made the disposition alleged by him, for the evidence on behalf of the Respondent, denying that any such special arrangements were ever made, was at least as strong as that led by Appellant.

Assuming that it was legally competent for Manekwana to translate Sakaza to his uncle Bodhloza, and Appellant to his uncle Nqaka, the Appellant would nevertheless fail in his claim, for the onus of proving such translations would rest on him, and he has failed to discharge it.

It is not, therefore, necessary for the Court to decide the legal question raised, but as it is a point of importance which may arise in future actions, it would appear to be desirable that we should express our opinion upon it.

The alleged dispositions amount to a violation of the primogenitive succession, which is a fundamental rule of hiership amongst Natives, and have not the sanction of

Native law as administered today. In the case of Mpengula vs. Ngqwaqo (1919 N.H.C. 65) CHADWICK. A.J.P. said:-

> "Succession under Native Law does not depend upon the will of a kraalhead; if it did it would often be found that the son of the last or youngest wife would be made heir to the exclusion of the rightful heir. Old men often prefer to favour their youngest wife, but the law prohibits them from doing so. The heir owes his position to the status of his mother, and not to the will of his father. Nyosi no doubt knew this, and in order to favour the son of his youngest and probably best-loved wife, he endeavoured to remove his real heir from the succession by translating him to his grandfather's house on the pretence of "vusa-ing" his grandfather."

Clearly, then, the Respondent (Mkitshwa) as the eldest son and heir of the Indhlunkulu is entitled to succeed to the estate of his father's younger brother, Nqaka, who died leaving no son of his body.

The definition of "etula" in the Code of Native law of 1891 is as follows.-

"It denotes a custom arising out of a marriage, and implies the transfer, in the discretion of the kraalhead, of cattle from a lower to an upper house." Appellant's contention is that a boy, viz. Sakaza, was "etulad". It is of course a customary thing for a girl to be "etulad"; that means that on her marriage the lobolo cattle paid for her are taken by the "house" to which she has been "etulad". It is not the girl herself, but the property rights in the girl which are "Etulad".

There are no property rights in a boy, and at the present time it is unheard of to "etula" a boy. It is contended that it was a Zulu custom to do so at the time when Manekwana made the arrangement. If it was, it is no longer sanctioned by Law. The Appellant's contention is, therefore, untenable, and he could not succeed even if he conclusively proved that Manekwana had made such an arrangement.

We come to the conclusion that the judgment of the Native Commissioner in declaring Respondent (Mkitshwa) to be the heir of the estate of the late Nqaka, falls to be confirmed.

The appeal is dismissed with costs.

CASE 8 ...

CASE 8. 1948 (T&N) 17-18.

SHADRACK MADUMO VS. JOSEPH MANNE.

PRETORIA. 15th March, 1932. Before E.T.Stubbs, President C.H. Blaine and J.C.Yeats, Members of Court.

NATIVE APPEAL CASES - Damages for assault at Native Law - Assault not actionable - Exception upheld - Kraalhead not responsible for conduct of inmates where such conduct is not actionable at Native Law - Section 11(1) of Act 38/1927.

An æppeal from the decision of the Native Commissioner at Brits.

AN ACTION FOR DAMAGES FOR ASSAULT IS UNKNOWN TO NATIVE LAW. A KRAAL HEAD IS NOT LIABLE FOR TORTS COMMITTED BY A KRAAL INMATE WHERE SUCH TORTS ARE NOT ACTIONABLE AT NATIVE LAW.

The Plaintiff (now Appellant) sued the Defendant (now Respondent) in the Court of the Native Commissioner, Brits, for £10 damages which he alleges he suffered by reason of the daughter of Respondent (Priscilla Manne) having assaulted Malebo Madumo his own daughter. Appellant in his summons says, "that according to Native Custom, the father of Priscilla is liable". It is clear therefore that he claims under Native Law and Custom and the Native Commissioner has indicated in his reasons for judgment that he has decided the matter in accordance with the principles of that law.

On the day when the case was first heard the Respondent failed to put in an appearance and the Native Commissioner, after hearing the evidence of Appellant and his witnesses, entered judgment by default for Appellant as prayed with costs.

Subsequently Respondent applied to the Court for a rescission of the judgment on the ground that there had been no valid citation in that he had been given only six days notice to enter appearance to defend the action instead of ten days as required by Rule 25 of the Rules for the Courts of Native Commissioners in Civil Proceedings. This rule provides that "the date on which the Defendat shall be required to appear shall be not less than ten days if beyond the distance of fifteen miles from the Court house". The parties agreed that the distance from Respondent's residence to the Court is twenty miles and that in the event of a rescission of judgment being granted "the principal case be gone into immediately". The Native Commissioner granted the application and rescinded the default judgment.

The Respondent thereupon excepted th the summons on the grounds that it disclosed no cause of action in that:-

(1) .....

(1) If the action is brought under Native Law and custom:

(a) Assault is not actionable thereunder or

(b) The Defendant is not liable for damages for assault committed by his daughter or

(c) There is nothing to show that Native Custom is involved within the meaning of Section 11 of Act 38 of 1927 - alternatively:

(2) If the action is brought at Common Law the Defendant is not liable merely because the said assault was committed by his unmarried daughter, and there is no allegation that the latter is a minor at Common Law".

After hearing argument the Native Commissioner upheld the exception and dismissed the summons with costs. Against this judgment the Plaintiff has appealed on the grounds that the "judgment was bad in law in holding that kraalhead liability for torts committed by a member of his kraal is confined to cases other than those of assault and in holding that the exceptions taken by Defendant's Attorney were good exceptions..... and generally on the ground that the judgment is bad in law and against the weight of evidence".

It is clear that the appeal is brought primarily against the ruling of the Native Commissioner in upholding the exception (1)(a) that no right of action exists in Native Law whereby an injured party can sue for damages for acts of violence against his person. In arriving at his decision the Native Commissioner took no evidence and he was correct in not doing so. An exception that the summons discloses no cause of action raises a pure question of law on the pleadings and no evidence is necessary - Simon Tsele vs. Stephanus Moema (1930) 2 N.A.C. (N & T). Therefore, the contention in the notice of appeal that the judgment is against the weight of evidence is not understood.

The only evidence taken in this matter was that adduced at the first hearing before a Native Commissioner who was not the officer who gave the judgment against which the appeal is brought. It seems the first point which must be decided is whether under Native Law an action for damages for assault can be maintained. Seymour at pages 139 and 140 says that no such action exists under Native Law but must be tried according to Colonial Law. This contention has been accepted by the Courts and broadly it can now be said to be established Law. It would seem that notwithstanding this, the Appellant holds that a kraalhead nevertheless is liable for all torts committed by inmates of his kraal. Such an argument however, has no foundation in view of the fact that kraalhead responsibility is a principle of Native Law only, and as Section 11(1) of Act 38 of 1927 requires that suits between Natives involving Native customs shall be decided according to the Native Law applying to such customs, the Respondent in the present action cannot be held liable in his capacity as kraalhead for the conduct of another where such conduct under Native Law is not actionable.

The appeal is dismissed with costs.

1937. (T+N) 67.
1938 (") 77, 121.
1945 (") 117.

CASE NO. 9.

MAC'CULUM KAMBULE VS. ALFRED KUNENE.

DURBAN. 13th April 1932. Before E.T.Stubbs, President, F.H.C. Behrmann and J.T.Braatvedt, Members of Court.

NATIVE APPEAL CASES - Objection to summons after evidence had been led - Seduction - Applicability of Native Law or Common Law - Discretionary power of Native Commissioner under Section 11(1) of Act 38/1927 to be exercised judicially.

An appeal from the decision of the Native Commissioner Newcastle.

WHERE A SPECIAL DEFENCE OR OBJECTION IS RAISED IT MUST BE TAKEN "IN LIMINE" BEFORE DEFENDANT PLEADS, AND NOT AFTER ALL THE EVIDENCE HAS BEEN HEARD.

In this matter the Respondent in his capacity as kraalhead and father and natural guardian of Ida Kunene sued the Appellant for £150 damages for the seduction of Ida Kunene. In his summons he alleges that:-

"(a) On or about the 18th October, 1927, the Appellant seduced and carnally knew the Respondent's daughter, who prior to that date was a virgin.

"(b) In consequence of the said carnal connection Ida Kunene became pregnant and was on or about the 5th July, 1928, delivered of a male child, of which the Defendant is the father.

"(c) In consequence of the said pregnancy Ida Kunene was on the 29th May, 1928, dismissed from her position as school teacher at the Jobstown Native School, where she was receiving a salary of £2.10. 0 per month.

"(d) By reason of the seduction and subsequent pregnancy Ida Kunene has been injured in her good name and reputation, has lost employment and the salary attaching thereto and has consequently suffered damages in the sum of £150."

Respondent also claimed the payment by Appellant of the sum of £1 per month for maintenance and support of the child from the 5th July, 1928, until the age of majority.

Appellant pleaded that he did not seduce Ida Kunene as set out in the summons, but admits he is the father of the child. He pleaded further that Respondent claimed under Native Law from Appellant's kraalhead and Appellant's kraalhead tendered two head of cattle and later three head which Respondent refused. At the trial he again tendered three head of cattle and denied liability for any further sum.

After .....

After hearing evidence the Native Commissioner gave judgment for Respondent for £30 damages with costs and made no order in regard to the maintenance of the child. It is this judgment which is now in appeal before this Court. The grounds of appeal are fully set out in the notice of appeal.

The facts briefly are:-

1. Appellant and Respondent's daughter Ida first met in 1926 when they fell in love with each other.

2. Some time later Appellant had full connection with Ida. Appellant says it occurred in 1926, but Ida says it was not until the 18th October, 1927, that Appellant had full connection with her; that prior to that date he had on several occasions had external connection with her.

3. On or about the 2nd June, 1928, Respondent took his daughter to the kraal of Robert Kumalo, with whom Appellant at that time lived, to report that Ida Kunene had become pregnant as a result of her cohabitation with Appellant. Several other persons were present at this meeting.

4. No word was said at this meeting about Ida Kunene having been a virgin prior to her cohabitation with Appellant.

5. An offer of two head of cattle and a goat was made to Respondent which offer was refused. He, Respondent, wanted Appellant to marry Ida, to which proposal Appellant in his evidence says : "I did not agree or refuse". It is common cause however, that Appellant and Ida were "engaged" so it may be assumed that there had been some talk of marriage between them.

6. Some time in May, 1928, Ida Kunene, who was a school teacher, either left or was dismissed from her employment on account of her pregnancy.

7. On the 5th July, 1928, Ida Kunene gave birth to the child.

8. During 1931 Appellant married another girl and Respondent on hearing of this went again to Robert Kumalo's kraal and demanded ten head of cattle "as compensation". Robert Kumalo, acting on behalf of Job, brother and kraal-head of Appellant, offered Respondent three head of cattle which Respondent refused.

After all evidence had been heard by the Native Commissioner the Attorney for Appellant objected to the summons. The Native Commissioner says: "at the outset of his argument Mr. Crook for the Defendant (Appellant) took an exception or objection to the summons that the Defendant (Appellant) should not be sued personally but that his kraal-head should have been sued in terms of paragraph 208 of the Code of Native Law of 1891 (Natal)". As this question is one

raised .....

raised in the grounds of appeal it will be as well to dispose of it before touching upon the other points raised in the notice of appeal.

This Court has already decided that though no provision is made in the Rules for Courts of Native Commissioners for exceptions or objections, it is nevertheless a fundamental principle of all systems of jurisprudence that the Defendant should know what case he has to meet - Simon Tsele vs. Stephanus Moema 1930 N.A.C. (N & T). But I think there can be no doubt that where such special defence is raised it must be taken in limine before the Defendant pleads. It is only after such a special plea has been decided that trial of the general issue takes place. If the objection is upheld the summons is dismissed and there is therefore no necessity to try the issues raised in the summons. In the present action the Appellant having failed to raise the objection before he pleaded he cannot be permitted to take it at the end of the proceedings after all the evidence has been heard. It seems to me that possibly a Defendant could be allowed to raise an objection after the commencement of a trial only when he is able to show that he only became aware of the fact upon which he founded his special plea (e.g. that the Plaintiff had no locus standi) after he had pleaded to the general issue. The first ground of appeal must therefore fall away.

The next ground of appeal which it will be convenient to discuss at this stage is No.5 as set out in the notice of appeal, which is as follows:

> "The Native Commissioner was wrong in applying the Common Law to a case in which the Natives themselves had recognised the Native Law and Custom and the Code in connection with the matter by Respondent himself suing under the Code instead of his daughter taking proceedings and by the Respondent having purported to report the pregnancy according to Native Custom, and the parties by their actions showed that they were living under and governed by Native Law and Custom".

The Native Commissioner in his reasons for judgment says: "In this case I am trying the case under Common Law". Under the provisions of Section 11(1) of Act 38/1927 the Native Commissioner has discretion to choose whether he will try the action by Native Law or by Common Law. If in his view by the former the aggrieved party would be without redress, but by the latter would have redress, he should apply the law which provides the remedy - C.S.Moguboya vs. William Mutato 1929 N.A.C. (N & T) -, but this discretion is a judicial one and should not be confused - Jacob Ntsabelle vs. J. Poolo 1930 N.A.C. (N & T).

In this case the parties are Zulus and reside in an area to which the Natal Code of Native Law applies. Section 24(1) of Act 38/1927 provides that the Natal Code of Native Law shall remain of full force and effect until amended under the provisions of this section. The Appeal

Court held that the object of the Section was to preserve the Code intact - Simon Ngcobo & Another vs. Steshi Ngcobo 1929 N.A.C. (N & T). Now the Code has special provisions regarding seduction. Section 208 of that Code provides that "the seduction of a girl gives to her kraalhead or guardian a civil claim in damages against the kraalhead of the seducer.

The parties throughout have observed Native Custom. The Respondent when he discovered that his daughter was pregnant reported the pregnancy to Appellant's kraalhead and the latter in accordance with Native Custom offered to pay Respondent the usual damages. Respondent refused to accept the damages and wanted Appellant to marry his daughter and it was only two years later after he had discovered that Appellant was married to another woman that he demanded ten head of cattle "as compensation". In Msonti vs. Dingindawo 1927 A.D. 531 it was held that by Native Law and Custom a seducer of an unmarried Native woman is liable to pay a beast as "Ngqutu" and in addition an "Imvimba" beast for each child born of the intercourse. In Jacob Ntsabelle's case (supra) the Court held that the father under Native Law is entitled to claim damages to compensate him for reduction in the number of lobolo cattle he is likely to get on the marriage of his daughter.

In the circumstances the Native Commissioner was wrong in applying Common Law in this case and he was also wrong in holding he was "not bound by any Native Custom regulating damages, and could award whatever amount that may be suitable to the case under consideration".

It is true that the girl in this suit is educated and that she probably lost her employment as a school teacher on account of the pregnancy, admittedly caused by the Appellant; but this fact cannot entitle her father to greater compensation than the number of cattle laid down by the authorities as being the damages for which the seducer or his kraalhead is liable.

Appellant tendered two head of cattle before the commencement of the trial and three head when the claim was instituted and this number would be allowed if it were not for the provisions of Section 178 of the Native Code which limit the number of lobolo cattle claimable to ten head. If Respondent were adjudged entitled to the full number tendered, the object of the Section would be defeated in that Ida's lobolo, being now nine head of cattle, would on her marriage be one head in excess of the number to which the Code limits it.

The Appeal is allowed with costs and the Native Commissioner's judgment altered to judgment for Plaintiff (Respondent) for two head of cattle. Costs to be paid by Plaintiff (Respondent).

CASE NO. 10. 1938 (T+N) 29, 57

TIMOTHY BHULOSE VS. THOMAS TABETE.

DURBAN. 14th April, 1932. Before E.T. Stubbs, President, F.H.C. Behrmann and J.T. Braatvedt, Members of Court.

NATIVE APPEAL CASES - Interpleader action - Wrongful attachment - Kraalhead not cited as co-defendant but as assisting judgment debtor - Kraalhead not liable - Appeal allowed.

An appeal from the decision of the Native Commissioner at Mapumulo.

WHERE, TO FULFIL THE LEGAL REQUIREMENT THAT A MINOR MUST BE DULY ASSISTED IN AN ACTION, A JUDGMENT DEBTOR HAD BEEN SUED "DULY ASSISTED" BY HIS FATHER, THE PROPERTY OF THE LATTER IS NOT LIABLE TO ATTACHMENT IN SATISFACTION OF THE DEBT DUE BY THE SON.

This appeal arises from an interpleader action in which the Appellant (Timothy Bhulose) claimed in the Court of the Native Commissioner, Mapumulo, certain three head of cattle and a horse which had been attached by the Messenger of the Court in execution of a writ issued against Shemese Bhulose, the judgment debtor, who in that case was assisted by his father, the present Appellant. and in which the Respondent (Thomas Tabete) was the judgment creditor. The Native Commissioner dismissed the claim without any enquiry on the grounds that the Appellant (claimant before him) was a party to the original action against Shemese Bhulose, the judgment debtor. This appeal is against that finding.

In the original action the Respondent, (Plaintiff), claimed from Shemese Bhulose three head of cattle or their value £4.10.0 each, for the seduction of his daughter, and £3 as and for general damages. Shemese Bhulose was then unmarried and lived with his father, the Appellant, who assisted him in the proceedings.

The Respondent (judgment creditor) elected to proceed against the seducer (Shemese Bhulose) and did not avail himself of his remedy against the kraalhead (Appellant) under Section 208 of the Code of 1891. The question as to Appellant's liability, had he been the Defendant in the original action, does not fall to be decided. This Court is only called upon to decide whether or not Appellant was a party to the original action by reason of having been cited as "duly assisting" the judgment debtor in that case so as to make his property liable to attachment in satisfaction of the judgment debt against his son Shemese. The answer must be in the negative, for he was not co-defendant and was merely brought in to supply the legal requirement that a minor must be assisted in any action submitted for decision. In the circumstances the judgment obtained against the judgment debtor (Shemese Bhulose) operates against him only and any property he may have in the kraal of his father.

The appeal is allowed with costs and the matter is referred back to the Native Commissioner for trial.

CASE NO. 11. .....

CASE NO. 11. 1941 (T+N) 92.

MAKASINI MDIMA VS. MSOLWA MDIMA.

DURBAN. 19th April, 1932. Before E.T. Stubbs, President, F.H.C. Behrmann and J.T. Braatvedt, Members of the Court.

NATIVE APPEAL CASES - Section 68 of Schedule to Law 19 of 1891 - Right to claim against heir of kraalhead - Section 13 of Schedule to Law 19 of 1891 - Res Judicata - Costs.

An appeal from the decision of the Native Commissioner at Ndwedwe.

WHERE A KRAAL INMATE PREMATURELY SUES THE KRAALHEAD FOR THE RETURN OF PROPERTY TAKEN FROM HIS HOUSE AND USED FOR THE BENEFIT OF ANOTHER HOUSE, IT IS COMPETENT FOR THE NATIVE COMMISSIONER TO QUALIFY HIS JUDGMENT FOR DEFENDANT BY GRANTING LEAVE TO PLAINTIFF TO RENEW HIS ACTION UPON THE DEATH OF THE KRAALHEAD.

In this case Respondent sued the Appellant in the Court of the Chief Mandhlakayise for one beast, 22 goats and £3 cash the property of Respondent's house which had been used by the late Nyovana, the father of the parties. The Chief gave judgment in favour of Respondent and Appellant appealed to the Court of the Native Commissioner. The Native Commissioner upheld the Chief's judgment and dismissed the appeal with costs.

During the trial, evidence was adduced that the matter had been previously decided in the Chief's Court in favour of Respondent when he sued his father, Nyovana for the same number of cattle and goats and £3 cash and that Nyovana had appealed to the Court of the Magistrate, Ndwedwe, when the Chief's judgment was upheld.

The Native Commissioner's judgment referred to above was taken in appeal to the Native Appeal Court which made the following order: "The judgment of the Native Commissioner is set aside. The case is referred back to his Court with instructions to take further evidence with the object of proving beyond doubt that the matter was adjudicated upon by the Magistrate, Ndwedwe, and thereafter to give his judgment on the evidence as a whole. Costs in the Court below and in this Court to be costs in the cause".

In pursuance of this order the Native Commissioner took the evidence of the Clerk of the Court, Ndwedwe, who produced the record of the case heard before the Magistrate. The judgment of the Magistrate was as follows:-

"That the judgment of the Chief Mandhlakyise be, and the same is hereby set aside and judgment is entered dismissing Respondent's claim against Appellant with costs, without prejudice to any action Respondent may wish to take on his father's death for property of his house used for the benefit of other houses of his kraal". This judgment was delivered in 1920 when the Appellant was the late Nyovana and the Respondent Msolwa, the Respondent in the present suit.

It is.....

It is admitted that Nyovana was the father of the parties; that the Appellant is the general heir and the Respondent the heir to a minor house, and that the matter in issue was the same as in the present action. It was with the object of ascertaining whether the matter had been finally disposed of by the Magistrate, Ndwedwe, in 1920 that the Appeal Court referred the case back to the Native Commissioner as had such been the case the Court would have been bound to raise the point of res judicata suo motu and dismiss the summons - Maria Rankune vs. Hendrik Rankune 1930 N.A.C.(N & T).

The Native Commissioner has apparently come to the conclusion that the judgment of the Magistrate has not finally disposed of the matter in so far as the rights of Respondent are concerned, and it will therefore be necessary to examine that judgment before proceeding further with the case. It is clear that the Magistrate gave judgment against Respondent in favour of the late Nyovana, and that the Respondent could at no time again have sued the late Nyovana for the same property. The claim therefore against the late Nyovana was res judicata. But the Magistrate qualifies the judgment by adding the following words: "Without prejudice to any action the Respondent may wish to take on his father's death for property of his house used for the benefit of other houses of his kraal". In the circumstances can the present Appellant (General Heir of the late Nyovana) or the Court raise the point of res judicata?

The Magistrate did not intend to deprive the Respondent of any right of action he might have against Nyovana's heirs; but had the Magistrate the jurisdiction to enter a final and definitive judgment against Respondent in favour of Nyovana and at the same time give him the right to sue the late Nyovana's heir for the property after Nyovana's death?

I think in the circumstances he had the power to do so. Section 68 of the Code provides that the kraal-head has absolute charge, custody or control of all property belonging to the houses of his family. <u>When not merely guardian</u> he is "absolute owner" of such property; provided that he may not use or deal with house property for the benefit or on behalf of any other house in the kraal, without creating an obligation on the part of such other house, to return the property so alienated or its equivalent in value. In my opinion, therefore, the Magistrate was probably right in holding that Respondent could not claim any property taken <u>from</u> his house by Nyovana during his life time. Nyovana was not merely guardian; he was the kraalhead "in his own right" as defined by Section 13 of the Code of 1891. The Respondent is however obviously not barred from claiming from Nyovana's general heir. If this is so, then the parties in this action are not the same as in the case tried by the Magistrate, Ndwedwe, and the plea of res judicata cannot be raised.

The Native Commissioner has presumably come to the same conclusion, for in his reasons for judgment he has discussed the merits of the case and his judgment is in favour of Respondent.

The matter in issue is briefly outlined in the judgment pronounced by the Appeal Court when the case originally came before it on appeal. The questions which must now be decided are.-

1. Was the property used by the late Nyovana kraal property or was it property belonging to Respondent's house?

2. If the property belonged to Respondent's house did the late Nyovana use the property for the benefit or on behalf of any other house in his kraal?

3. What dit the property used by the late Nyovana consist of?

The evidence adduced by both parties is very conflicting and it is difficult from a perusal of the record to say who is telling the truth; but after carefully considering the evidence and the probabilities I see no reason to disagree with the Native Commissioner's finding on the facts. I come to the conclusion therefore that the property used by the late Nyovana belonged to the house of Respondent; that the property was used for the benefit or on behalf of the Indhlunkulu, the house of Appellant, and that that house is under obligation to return the property to Respondent's house. The Magistrate, Ndwedwe, must have reached the same conclusion, otherwise there would have been no necessity for him to qualify his judgment in favour of Respondent as he did.

The next question to decide is; What dit the property used by the late Nyovana consist of? the fact that the Respondent sued the late Nyovana for the same property which he now claims from Appellant is significant. The evidence shows that the beast was purchased by Respondent with money obtained from his earnings; that £3 cash had been earned by his mother and that one goat had been given to the mother of Respondent by the late Nyovana during his life time. This must have occurred many years before 1920, when the matter came before the Magistrate, Ndwedwe, for at that time the Respondent claimed the same number of goats, i.e. 22, presumably the increase of this one gift goat.

I see no reason to disturb the Native Commissioner's judgment.

The appeal is dismissed with costs.

CASE NO. 12.

VEYAPI MSOMI VS. KAKA MSOMI.

DURBAN. 28th June, 1932. Before H.C. Lugg, Acting President, P.G. Armstrong and J.T. Boast, Members of Court.

NATIVE APPEAL CASES - Customary union - Husband and wife - Divorce - Return of lobolo cattle - Section 168 of Code of 1891 construed.

Appeal from the Court of Native Commissioner, Umzinto.

WHERE THE DISSOLUTION OF A CUSTOMARY UNION IS ORDERED AT THE INSTANCE OF THE HUSBAND IT IS OBLIGATORY UPON THE NATIVE COMMISSIONER TO ORDER A RETURN OF CATTLE.

Note.....

(Note. Section 81 of the revised Code of Native Law (Natal) provides for the return of "at least one head" in these circumstances).

In this case Appellant sued his wife, Respondent, before the Native Commissioner, Umzinto, for a divorce on the grounds of wilful desertion and refusal to render conjugal rights. He also claimed a refund of 15 head of cattle paid by him on her marriage.

The Commissioner granted the divorce but disallowed the claim for the return of the lobolo, holding on the facts that the husband was entirely to blame for his wife's desertion.

Appellant is dissatisfied with this part of the order and brings it in appeal. It is the only point we are called upon to consider, but although it will be shown that the Commissioner was wrong in granting the decree at the instance of the husband, we have decided not to interfere with this portion of his order as we are informed that the woman has since remarried.

The parties were married according to Native Custom in 1923; 16 head of cattle were paid on her marriage and two children were born to the union, one of which is alive.

The woman's father alleges that four years after the marriage his daughter returned to him ill, and that she has remained with him ever since. He also alleges that she was driven from home on several occasions and was the subject of illtreatment generally. On the other hand Appellant's only complaint is that his wife refused to return, but the record is very scanty on this point and we feel that his story has not been fully told. In particular we would refer to his cross-examination of Respondent where he questions the parentage of one of her children. He admits that some six or eight months prior to the institution of the present claim (about the middle of 1930) an order was made against him to maintain his wife but that he did not comply with it. It would also appear that at about the same time he was unsuccessfully sued by his wife for a divorce.

The Commissioner has found as a fact that the woman was blameless, but we would like to have a little more evidence on this point. So far only the Appellant, Respondent and her father have given evidence.

Section 163 of the Code lays down specifically the grounds on which a husband can obtain a divorce. If we are to accept the Commissioner's finding that all the fault lay with the husband and not with his wife, then it was not competent for him to have granted the decree at all for the simple reason that he failed to establish a case against her. He should have given judgment for the Defendant. This would have enabled the Respondent to have instituted an action against her husband. In such event it would not be competent for the Court to make any order for the return of cattle to the husband in view of the proviso to Section 168. This proviso, as Mr. Hunter has rightly pointed out, only provides for a refund when the suit is at the instance of the wife, and a decree allowed because of the wrongful acts of the husband.

The section is silent as to what should be done where both parties are found at fault, or where as in the

present...

present case, the claim was instituted by the husband. In such cases presumably the proviso would not operate. Its restrictions should be strictly limited to cases falling within its scope.

But it is probable that the Commissioner, finding that it was impossible for the parties to continue living together, decided that it would be in the interests of both to have them parted, and granted a decree notwithstanding that the Appellant had failed to establish his case. But unfortunately the present Code makes no provision for such cases, although Section 76(f) of the draft Corde (not yet in force) does where the conditions are such as to render the continuous living together of the partners insupportable or dangerous.

But as I have already pointed out we are not being called upon today to question the legality or otherwise of the decree itself. We are only concerned with the order for the non-return of cattle.

To remit this case for further evidence will occasion unnecessary expense and hardship. There are reasonable grounds for assuming that there is fault on both sides. The fact that the woman failed to get a divorce when she sued is some indication of this, and there is the further inference to be gathered from the cross-examination by her husband that the parentage of one of the children was in question. Clearly out duty is to set aside the whole of the proceedings but we are faced with the difficulty that the woman has since remarried. We also realise that she has a good claim for divorce. Under the circumstances we have decided to deal with the matter on the information we have before us. We consider that there should be a return of cattle to the husband. He paid 16 head in all, but in view of the fact that he is mainly responsible for the present state of affairs we consider that he should only be allowed a refund of 5 head. We might add that this view finds acceptance with both Mr. Hunter and Mr. Forbes.

The appeal is therefore sustained and the Commissioner's order in respect of the non-return of cattle amended to one for the return of five head of cattle or their equivalent value, £22.10.0. being at the rate of £4.10.0. each. There will be no order as to costs.

CASE NO. 13. 1446 (T & N) 37.

MBULAWA MAPUMULO VS. MZANGEDWA MAPUMULO.

DURBAN. 7th July, 1932. Before H.C. Lugg, Acting President, P.G. Armstrong and J.T. Boast, Members of Court.

NATIVE APPEAL CASES - Native Law - Inheritance and Succession - Custom of Ukuvusa - Ancient claim - Proof - Hearsay evidence.

Appeal from Court of Native Commissioner, Pinetown.

WHERE AVAILABLE PRIMARY EVIDENCE DOES NOT SUFFICE TO DETERMINE AN ISSUE WHICH AROSE MANY YEARS PREVIOUSLY, HEARSAY EVIDENCE MAY BE TAKEN INTO ACCOUNT WHEN ASSESSING PROBABILITIES.

The.....

The events to which this case relates go back to about [illegible].

Respondent is a son of Sakayedwa by his fourth wife Mamagwigwi.

Sakayedwa had six wives, and the sole point we are called upon to decide today is whether his kraal comprised all these women or only three of them.

Respondent's contention is that the last three women were married by Sakayedwa for the express purpose of resuscitating the name and estate of his great uncle Ntengo who lost his life in Tshaka's ill-fated Balule campaign of 1827, and that it comprised an entirely separate kraal to which, by reason of Respondent being the eldest son of his mother's house, he succeeded as general heir.

Appellant on the other hand denies that there ever was such an arrangement and maintains that all the women in the kraal were lobolad with indhlunkulu cattle; and on this ground he claims to succeed to the property attaching to the houses of the fifth and sixth wives.

It should be explained at this stage that there is male issue consisting of grandsons of the fifth wife who would succeed to this house so that Appellant's rights to this particular house would be limited, in the event of his claim being substantiated, to that of custodian and nothing more; but there are three daughters surviving to the sixth house to whose lobolo he would be entitled as there is no male issue surviving to it.

His claim in the aggregate amounts to seventyfive head of cattle or their value £375, but Counsel tells us today that the dispute is really over the lobolo of these three women.

The Native Commissioner accepted the story of the defence and disallowed Appellant's claim with costs.

This decision was brought in appeal before this Court last January but was set aside and remitted for further evidence, as doubts were expressed as to whether the Native Commissioner was justified in coming to a definite decision against Appellant on the evidence before him. Further evidence has since been taken and now the Native Commissioner has amended his original judgment to one of absolution from the instance with costs.

The matter again comes in appeal on the main ground that Appellant should succeed because Respondent failed to prove the establishment of a separate kraal in the name of Ntengo under the custom of ukuvusa.

As the defence relies on events which took place in 1827 and earlier it naturelly follows that much of the evidence relied on by him is of hearsay nature.

Respondent's story is that after Ntengo was killed in the Balule campaign his relations approached Seketwayo with a request that he should utilise Ntengo's two surviving daughters (he having left no male issue) for the purpose of resuscitating his name and estate under the custom of ukuvusa. To this Seketwayo agreed and with the cattle obtained on these two

women.....

women he lobolad his fourth and fifth wives, thus creating an entirely separate establishment. As regards the sixth wife Respondent alleges that she was acquired with cattle obtained from the lobolo of his own sister Nozimbagaza and that consequently this house also belonged to the same kraal i.e. the late Ntengo's kraal.

It now becomes necessary to trace back the family tree to ascertain the precise relationship between Seketwayo and Ntengo and the respective sections of the kraal to which they belonged.

From the evidence we find that Seketwayo belonged to the ikohle section of his grandfather, Ngcayiza's kraal, whilst Ntengo belonged to the indhlunkulu section; and that Seketwayo and Ntengo were first cousins. Ntengo was the son of Dibandhlela the son of Ngcayiza, whilst Seketwayo's father Msinyiswa was also a son of Ngcayiza's. Dibandhlela and his son Ntengo both lost their lives in the Balule campaign.

Dibandhlela belonged to the indhlunkulu section of Ngayiza's kraal whilst Seketwayo's father Msinyiswa belonged to the ikohlo.

These facts are of considerable importance when we come to consider why the choice to resuscitate or vusa the house of Ntengo should have fallen on Seketwayo. But the reason is obvious. He belonged to the ikohlo section of the kraal, and having no claims to indhlunkulu property would be expected to act impartially in a matter of this kind and in which indhlunkulu property was involved.

If we are to accept the story that there was such a man as Ntengo, that he left property, and that he belonged to the indhlunkulu section, it is hardly likely that a member of the ikohlo would have been allowed to appropriate such property for his own enrichment.

The resuscitation of a man's name was a very solemn and sacred undertaking. Customs associated with vicarious parentage i.e. ukungena and its kindred customs of ukuzalela and ukuvusa, are bound up with the religious (ancestor-worship) system of the natives, and are regarded as serious undertakings; and we would expect that at the time when these marriages were contracted that they would have been more scrupulously observed than now.

We can do no better than refer to the case of Tekeka vs. Ciyana 1902 N.H.C. 13. where CAMPBELL, J.P. in an able and exhaustive judgment dealt fully with the subject.

This judgment has been affirmed on more than one occasion by the Native High Court since 1902, and is recognised as the correct view of Native Law on the point.

Appellant's claim is based on a simple statement that all Seketwayo's wives were lobolad with indhlunkulu cattle, but no attempt has been made to show exactly where all the cattle came from which would have been required to pay for such a large number of wives. It is a bald statement requiring more than bare corroboration by one witness.

Appellant....

Appellant denies all knowledge of Ntengo. He has never heard of such a man, and he denies that the custom of ukuvusa was ever observed by his kinsmen, the Mapumulo people; but it is idle for him to make such extravagant statements when it is known that these customs are universally practised not only by the Natives of this Province but by many other African tribes. Ane one can hardly believe that the minute details which have been given regarding the early history of the family are a mere fabrication.

One would not expect a son to lay claim to half an estate unless he had some good ground for doing so; but the Respondent in this instance is no sudden upstart. He appears to have exercised control over the three houses in question for about twenty-five years, and he married off some of the daughters and appropriated the lobolo during the lifetime of Appellant's father Mbopa without effective protest. It is alleged that Mbopa did protest, and reference has been made to a quarrel over some cattle trespassing in a field and which is alleged to have been associated with such a protest, but the statement conveys no weight.

Mbopa took no serious steps to assert his rights, and he certainly never resorted to judicial proceedings. The excuse that he did not do so because he was a sickly person cannot be allowed to weigh with us. The fact remains that Respondent's rights have never been seriously questioned until now.

It is also significant that the sixth wife was lobolad with cattle from Respondent's house; and there is also the fact that Seketwayo' had three separate kraals. It is stated that his own section was known as the Mpumuza kraal, the Ntengo section as the Emaqandeleni, and the Ikohlo section as the Mangweni.

It is hardly likely that the indhlunkulu section would have been known by different names unless it comprised two different establishments.

The Assistant Native Commissioner has dealt with this case in a thorough and painstaking manner and we see no reason to differ from his finding.

The appeal will be dismissed with costs.

CASE NO. 14.

FANI MTEMBU VS. MGOBOYI NDHLAZI.

DURBAN. 7th and 8th July, 1932. Before H.C. Lugg, Acting President, P.G. Armstrong and J.T. Boast, Members of Court.

NATIVE APPEAL CASES - Native Law - Lobolo claim - Zululand - Section 182 of Natal Native Code - Seduction - Damages not part of lobolo proper.

SECTION 182 OF THE NATAL CODE OF 1891 (SINCE

REPEALED.....

[illegible] ACTS ONLY AS A BAR TO A CLAIM FOR PAYMENT OF LOBOLO AND NOT AS A DISCHARGE. WHERE THE PARTIES HAD REMOVED TO ZULULAND WHERE THE CODE DID NOT APPLY, IT IS COMPETENT FOR ACTION TO BE INSTITUTED THERE FOR RECOVERY OF LOBOLO DUE IN RESPECT OF A MARRIAGE ENTERED INTO IN NATAL PROPER IN 1906.

This case comes before us in appeal from the judgment of the Acting Native Commissioner, Mtunzini, Zululand.

In 1906 the parties were domiciled in the Stanger District of Natal, but later removed to Zululand where they are now residing.

In the year mentioned Respondent married Appellant's sister according to native custom, and had the marriage registered at Stanger. Before the marriage Appellant had been awarded by the Magistrate, Stanger, a beast as damages for the seduction of his sister by Respondent, and the whole point in issue today is really over this beast. Respondent maintains that as he subsequently married the woman he seduced, he has the right to include this beast as part of the lobolo proper, but Appellant declines to treat it in this way.

The Chief, before whom the matter came in the first instance, in awarding Appellant a judgment for four head, (which also included three other cattle due on the marriage), upheld Appellant's contention, but his ruling on this point was set aside by the Acting Commissioner on appeal, the latter holding to the contrary.

At the outset, Mr. Forbes, who appeared for Respondent, took exception to the jurisdiction of the Courts. He asked us to consider whether the Chief had any right to hear the matter at all in view of the fact that the cause of action arose in Natal in 1906 at a time when such claims were barred in that Province by Section 182 of the Code. He submitted that it was barred for all time and was in no way affected by the subsequent removal of the parties to Zululand.

On the other hand Mr. Hunter relied on the non-application of the 1891 Code to Zululand; to the fact that at no time had there been any restrictions against the prosecution of lobolo claims in that Province, and to Section II of the Native Administration Act.

It will be convenient at this stage to quote these two sections.

Section 182 of the Code Reads:-

"Subsequent to the 31st day of December, 1893,
"no action may be instituted in any Court for the re-
"covery of lobolo, or inheritance arising out of lobolo
"claims, in connection with any marriage entered into
"before the date of the promulgation of this Code; and
"no action may be instituted at any time or before any
"Court for the recovery of lobolo in respect of marriages
"entered into after the promulgation hereof."

Section 11 of the Native Administration Act reads:-

"(11(1) Notwithstanding the provisions of any other
"law it shall be in the discretion of the Courts of

Native.....

"Native Commissioners in all suits or proceedings between "Natives involving questions of customs followed by "Natives, to decide such questions according to the Native "Law applying to such customs except in so far as it shall "have been repealed or modified; Provided that such "Native Law shall not be opposed to the principles of "public policy or naturel justice; Provided further that "it shall not be lawful for any Court to declare that the "custom of lobolo or bohadi or other similar custom is "repugnant to such principles.

"(2) Where the parties to a suit reside in areas "where different laws are in operation, the Native Law, if "any, to be applied by the Court shall be that prevailing "in the place of residence of the defendant".

On a strict interpretation of Section 182 it seems clear to us that the whole question is really one of procedure.

Lobolo has never at any time been regarded as illegal or immoral in Natal, and no such inference can be drawn from Section 182. This section was introduced as a measure of convenience to keep within reasonable limits the number of Native cases coming before our Courts. As soon, however, as it was found that the section was causing hardship by reason of East Coast Fever restrictions on the movement of cattle, etc., Act No. 7 of 1910 was passed to give power to the Supreme Chief to suspend the operation of the section, and this was done by Proclamation No. 9 of 1910.

On the other hand there have never been any restrictions of this nature operative in Zululand. There the 1878 Code applied until it was repealed on the 1/1/29, and since then the Courts have applied purely Native Law as recognised under Section 11 of the Native Administration Act.

This being so it follows that the claim must be subject to the lex fori of Zululand, and consequently the Appellant had the right to enforce recovery through the Courts of that Province.

In arriving at this conclusion we have been influenced largely by the decision in the two cases of African Banking Corporation vs. Owen (1897) 4 O.R. 253, and Langerman vs. Van Iddekinge 1916 T.P.D. 123.

In the former it was held in the Transvaal, where a creditor sought to recover a claim prescribed by a Natal statute, that the Natal provision only acted as a bar to the action and not as a discharge. Consequently the debt was recoverable in the Transvaal.

This is precisely the position in the present case. Section 182 acted as a bar and nothing more.

In Langerman vs. Van Iddekinge, following the decision in African Banking Corporation vs. Owen, section 17 of Cape Act 38, 1884, made it unlawful for any person to proceed in any manner against an insolvent in respect of any debt or demand proved or provable against his estate at any time after the lapse of four years from the date of the sequestration. After a debt incurred in the Cape Province had become prescribed in terms of the above section, the creditor sued for the recovery of the debt in the Transvaal, whence the debtor had

removed. Held, that the section acted only as a bar to the action and not as a discharge, and that the debt was consequently recoverable in the Transvaal.

The exception to jurisdiction will accordingly be dismissed.

Regarding the other point raised, it has always been the recognised practice in Natal for the father or guardian to exact damages for the seduction of a daughter or ward; and we are not aware that the position is in any way affected by the subsequent marriage of the seduced woman to her seducer. Seduction is an offence in Natal under Section 277 of the Code, and damages are recoverable under Section 208. It was also an offence under pure Native Law because we have been informed by the older generation of Natives that it was not uncommon for a seducer to be put to death in the time of the Zulu Kings regime.

Section 61 of the 1878 Code provides that "there is "a civil liability to the person injured, or his heir, in "respect of all unauthorised acts (though they be also crimes) "if they occasion bodily or pecuniary or social injury".

This section and the Code of Native Law of 1891 (Natal) should be taken as a guide of what Native Law really is on the point, but apart from these considerations we might say that it has long been the recognised practice in both Natal and Zululand to claim damages for seduction. In many places, however, it is not unusual for an indulgent father-in-law to remit, e.g. the mvimba and to include it in the lobolo where the seducer subsequently marries the girl, but even in these circumstances the mother similarly claims a goat or a small sum of money as the mgezo or cleansing fee.

It seems only reasonable that a man should be entitled to some redress for the stigma cast upon his family for it must be remembered that under strict Native custom a seduced woman is never accorded the full wedding ceremony of a virgin. For example she would be denied the rituals associated with the consummation of the marriage which follow and conclude the wedding festivities.

Under Native Law therefore Appellant would have had a good claim for damages and to regard any beast paid as such as something entirely separate from lobolo. But in the case before us his claim is even stronger because the beast was awarded him as damages by the Magistrate, Stanger, and so long as that judgment stands it must be observed.

The appeal will therefore be sustained, the judgment of the Acting Native Commissioner set aside, and the judgment of the Chief restored with costs.

CASE NO. 15. 1937 (T+N) 124.

PIET NXUMALO VS. CHARLIE NGUBANE.

PRETORIA. 14th September, 1932. Before H.C. Lugg, Acting President, G.D. Wheelwright and D.W. Hook, Members of Court.

NATIVE APPEAL CASES - Native Custom - Ownership - Capacity of son during lifetime of father.

An appeal from the Court of Native Commissioner, Johannesburg.

IT IS COMPETENT UNDER NATIVE LAW FOR A SON TO OWN PROPERTY DURING THE LIFETIME OF HIS FATHER. IN DECIDING THE SYSTEM OF LAW TO BE APPLIED TO A PARTICULAR CASE, A NATIVE COMMISSIONER'S COURT SHOULD BE GUIDED BY THE NATURE OF THE TRANSACTION GIVING RISE TO THE ACTION.

The present appeal arises from an interpleader action instituted by Appellant against Respondent for the recovery of a number of buildings situated on three stands in the Municipal Location of Johannesburg, attached at the instance of Respondent in an action by him against Appellant's son Thomas Nxumalo. The Native Commissioner found the buildings to be the property of the son and declared them executable.

Mr. Franks, who appeared for Appellant, submitted that the Commissioner was wrong on both the law and the facts; he contended that under Native Law no son could own property during the lifetime of his father, and that consequently the property in question could not in the circumstances belong to Thomas Nxumalo but to his father the Appellant.

He also argued that in any event the onus lay upon the judgment creditor to show that the property did not belong to the interpleader - an onus which he had failed to discharge.

In its exercise of discretion under Section 11(1) of the Native Administration Act of 1927 it is assumed that one of the first considerations for a Court is to determine whether the transaction in issue is one known to Native Law or not and to apply the law most appropriate. The parties to this case are all Natives falling within the definition of the word "Native" as set out in the Act, and subject to Native Law. The Native Commissioner held that Common Law was applicable and appears to have been weighed by considerations of environment rather than the nature of the transaction itself in applying Common Law to this case; but it seems to us that it is not so much a question as to whether the parties are resident in urban areas or not, or whether they can be classed as detribalised Natives or not, because it is readily conceivable that however situated, these people could be parties to contracts or transactions falling under either system of law.

It is not necessart, however, to seriously question the Commissioner's decision on this point because it so happens that whatever law was applied, the result would be the same in both cases.

Appellant's son is a married man and fully competent under Native Law to own property during his father's lifetime. The argument to the contrary is, therefore untenable. The only point remaining is to decide whether the property belongs

to .....

to him or to his father.

Appellant's story stands alone whereas the evidence for the Respondent not only receives strong support from a number of witnesses but is also supported by a number of factors which operate as a very strong presumption in his favour.

During the argument considerable stress was laid by Appellant's counsel upon a document put in marked 'E'. This document purports to be an acknowledgement of debt signed by Thomas Nxumalo and dated the 9th of June, 1931, in which he acknowledges to have received from the judgment creditor that day a loan of £80 and which was repayable within twelve months. It is admitted by the makers of this document that it was false but that it was executed in order to protect the interests of the judgment creditor in respect of certain monies due to him by Thomas Nxumalo for the erection by him of the buildings on the stands in question. In the following November and before the alleged loan had actually fallen due, the judgment creditor (Respondent) actually took out by consent a judgment for the recovery of this amount. Attachment followed and the present interpleader action has been the result.

An application was made to have the judgment rescinded or set aside but this was refused. We have not been called upon to question those proceedings and in so far as this Court is concerned the judgment still stands. The Native Commissioner finds as a fact that Respondent and Thomas Nxumalo were moved to act in this way under the belief that such a judgment would afford them protection against the Appellant's unjust claim to the property.

All three stands were registered in the name of the Appellant's son; it is shown that the son purchased the original stand from another Native; that subsequently buildings were erected on these stands at the instance of the son; that he let the premises and collected all rents and that he paid for the licences. These and other factors were relied upon by the Commissioner in holding that the property in dispute belonged to the son and not to his father the Appellant.

We find, therefore, as was held in Sophia Basi vs. Mandlangisa (1931) N.A.C. (C & O) 1931 (1) P-H R.19 that the execution creditor having destroyed the proof of ownership in the claimant, the latter must fail.

The appeal will be dismissed with costs.

CASE NO. 16. 938(T&N) 142

ABEL THLOPHANE VS. NKALI MOTSEPE.

PRETORIA. 16th September, 1932. Before H.C. Lugg, Acting President, G.D. Wheelwright and H. Rogers, Members of Court. (Judgment delivered on 18th November, 1932).

NATIVE APPEAL CASES - Lobolo claim - Native Law - Christian Marriage - Divorce - Supreme Court Decree - Estoppel.

An appeal from the Court of Native Commissioner, Brits.

COURTS OF NATIVE COMMISSIONER ARE COMPELLED TO TAKE COGNIZANCE OF LOBOLO CONTRACTS ATTACHING TO A MARITAL RELATIONSHIP, WHETHER IT BE A NATIVE CUSTOMARY UNION OR A MARRIAGE BY CHRISTIAN RITES, BUT THE OBSERVANCES AND FORMALITIES OF THE COMMON OR STATUTE LAW MUST NECESSARILY APPLY IN REGARD TO ANY MATTER ARISING OUT OF A CHRISTIAN MARRIAGE.

Appellant married Respondent's daughter in 1926 in accordance with civil rites. In June, 1931, he was granted a decree of divorce against his wife by the Provincial Division of the Supreme Court, Pretoria, with forfeiture of the benefits of marriage in community of property and custody of the minor child on the grounds of her malicious desertion.

In September, 1931, he instituted an action against the respondent in the court of the Additional Native Commissioner, Brits. In this action he claimed -

(a) The return of six head of cattle (or their value £30) and £10 in cash being the lobola which he had paid to the respondent in respect of his wife, respondent's daughter; this repayment he alleged that Defendant (Respondent) was by reason of his said daughter's desertion and divorce under obligation to make according to Native law and custom.

(b) The return of certain parts of a plough (valued at £8.12.6), certain furniture, crockery and cutlery (valued at £17), and certain clothing (valued at £14.3.6) or payment of their value amounting in all to £39.16.0.

In the particulars attached to the summons it was alleged that the defendant had wrongfully and unlawfully removed or caused to be removed from the possession of the plaintiff the clothing, to wit, two suits and three shirts in September, 1928, and the parts of the plough in the year 1929. As regards the furniture, crockery and cutlery it was stated that the defendant had wrongfully and unlawfully and in breach of the decree of divorce removed or caused them to be removed from the possession of the plaintiff on the 27th June, 1931.

A copy of the decree of divorce previously referred to formed an annexure to the summons and a certified copy thereof was handed in by plaintiff's attorney during the course of the proceedings. The relative order reads as follows:-

"That a decree of divorce be, and it is hereby "granted as prayed, with forfeiture of the benefits of "the marriage in community of property and custody of the "minor child of the marriage awarded to plaintiff, but "the child to remain for six months in the care of the "maternal grandparents and to be handed to the paternal "grandparents on 1st January, 1932; Plaintiff to pay "the maternal grandparents 2/6 per month maintenance for "the child, the first payment to be made on 1st July, "1931, and thereafter on the 1st of every month, until "six payments have been made; during this period of six "months the paternal grandparents to have full access to "the child."

In his plea defendant admitted having received from plaintiff six head of cattle and £10 in cash by way of lobolo

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for his daughter, but denied the right of plaintiff to reclaim any portion thereof, this contention being based upon -

(a) a denial of the desertion, and

(b) the further contention that plaintiff having had the custody of the child awarded to him was precluded under native law and custom from claiming the lobolo from the defendant.

As regards the other claims put forward by the plaintiff the defendant's plea was a complete denial of the allegations of fact contained in the summons.

The plaintiff's attorney took exception to that portion of the plea in which defendant denied his daughter's desertion and contended that by reason of the judgment in the divorce proceedings defendant was estopped from denying the desertion.

This exception was after argument overruled by the Court.

The Court, having regard to that portion of defendant's plea contending that the plaintiff having had the custody of the child awarded him was precluded under native law and custom from claiming the return of the lobolo, called to its assistance assessors from the Bakhatla-ba-Makau Tribe, to which both the parties belong, in terms of section nineteen of Act No. 38 of 1927. The assessors appeared before the Court on the 18th December, 1931, when certain questions (a), (b) and (c) were put to them. These questions and the replies form a portion of the record. In the opinion of this Court no weight can be attached to these replies as recorded for the following reasons - firstly, under Native law a father is always entitled to custody of his children so that the logical effect of the replies to question (a) would be that under no circumstances could a husband, except when there are no children, recover lobolo, a proposition which on the face of it is absurd; and, secondly, the replies to question (c) are directly in conflict with those to question (a).

The Court below, however, deduced from the replies that according to the customs of this particular tribe if a woman deserts her husband and he retains the children he is not entitled to the return of the dowry paid by him, unless it is found that the woman has returned to her father and that he, notwithstanding demand, refuses or neglects to send her back to her husband or his people.

The Court then intimated that as in Native law desertion, as such, does not ipso facto entitle a deserted husband to the return of lobolo paid by him it would be necessary for the plaintiff in the present case, in order to succeed in his claim for the return of the lobolo, not only to prove that defendant's daughter deserted him - as desertion is interpreted under Native law and custom - but also to show that defendant, notwithstanding demand, refused or neglected to restore her to her husband or his people.

The hearing of the case was then proceeded with, the Court ruling that the claim for the return of the lobolo

should.....

should be determined according to Native law and custom and the claim for the return of parts of the plough, the clothing the furniture, crockery and cutlery, should be dealt with under the ordinary or common law. This ruling was not challenged at the time nor has it been challenged on appeal.

The Court on the 8th February, 1932, entered judgment as follows:-

(a) As regards the claim for the return of lobolo, absolution from the instance with costs.

(b) As regards the claim for the return of parts of a plough and of certain clothing - judgment for defendant with costs.

(c) As regards the claim for the return of certain furniture, crockery and cutlery - judgment for defendant with costs.

Against this judgment the present appeal was brought.

The matter originally came before this Court on the 23rd May last when a preliminary exception was taken by respondent's counsel that he had not been furnished with the notice of appeal or the grounds of appeal.

After consideration of this exception the Court made the following order:-

"The case be and the same is hereby referred back "to the Native Commissioner for compliance with Rule "12(1) and (2) of the Native Appeal Court. Appellant's "attorney to comply with the requirements of Rule 9(1) "and (2) of the Appeal Court and to pay wasted costs of "the day."

When the matter was again brought before this Court on the 16th September, a further exception to the appeal proceeding was taken by Mr. Marais on behalf of the respondent on the ground that the notice of appeal (required under Rule 9(1)) was not received by him until after expiry of the period of twenty-one days prescribed by Rule 6. It was pointed out, however, that the order previously granted by the Court must be regarded as having condoned this breach and further that that order did not stipulate any period within which it should be complied with. The exception was accordingly overruled.

It is clear, however, that a measure of delay has occurred in this case which might well have been avoided had the rules of this Court been duly complied with in the first instance. The Court accordingly finds it necessary again to exphasise that its rules must be strictly observed by parties and practitioners and that any omission so to do will not be lightly condoned.

The plaintiff has appealed against the whole of the judgment of the Additional Native Commissioner on the grounds set forth in the notice of appeal dated the 8th August, 1932.

Appellant's attorney, however, at the hearing withdrew the appeal in so far as the claim for the return of furniture, crockery and cutlery (referred to in paragraph 4

of.....

of Annexure A to the summons) was concerned.

As regards the claim for the return of parts of a plough and certain clothing advanced in paragraph 3 of Annexure A to the summons, this Court finds no reason to disturb the finding of the Additional Native Commissioner that there is nothing in the evidence to connect the defendant (respondent) with the disappearance of the articles in question or to show that, as alleged in the summons, he wrongfully and unlawfully removed or caused them to be removed from the possession of the plaintiff (appellant). The Court decided that this claim should be determined under the ordinary law and this decision was not questioned or challenged by or on behalf of the plaintiff. The contention advanced in the grounds of appeal that defendant was responsible for the articles in question in his capacity as a kraal head must be rejected since such responsibility would vest in him only under Native law and custom which can have no part in a matter determined under the common law.

The appeal in so far as the claims referred to in paragraphs 3 and 4 of Annexure A to the summons must accordingly be dismissed.

In connection with appellant's claim for the return of the lobolo admitted to have been paid by him to the respondent in respect of his marriage to respondent's daughter Alfreda, several important considerations arise.

In the first place, we have Here the essentially Native custom of "lobolo" "bogadi", of which the Court, in terms of section eleven of the Native Administration Act, No. 38 of 1927, is bound to take cognisance, attached to a marriage contracted by civil rites under the statutory law and not in accordance with the observances and practices of the tribe concerned. The principle that any lobolo contract must necessarily be considered in relation to and in connection with the union to which it is concomitant has definitely been recognised by the courts - vide Kanisa versus Ngodwane (N.A.C. Reports Vo. V, page 49) and in the opinion of this Court the parties to any such contract attached to a civil or christian marriage must be held to have recognised and appreciated this essential fact with its logical corollary that the observances and formalities prescribed by the ordinary or statutory law and not those obtaining under Native law and custom must necessarily apply in regard to any matter arising out of that marriage, such as dissolution by reason of desertion.

This Court is entirely in agreement with the view expressed in the Rhodesian case of Dayimano v. Grace Kgaribaitse (P.H. 1931 R. 89) where it was laid down that:- "as a civilised marriage created a definite status whereunder the parties acquired certain rights and were subject to certain obligations, the dissolution of such marriage and the consequences arising therefrom were governed by fixed principles of policy and justice, even though the parties might be Natives. And therefore the attributes and incidents of Native Law only exist side by side with the civilised status in so far as they do not violate those principles."

This Court must accordingly disagree with the view that for the purposes of this case it was necessary for the plaintiff to prove desertion as interpreted under Native Law

and.....

and custom and to show that defendant notwithstanding demand refused or neglected to restore her to her husband or his people.

If it were necessary for the plaintiff to prove desertion at all, a point which is dealt with hereunder, it would for the purposes of a lobolo contract attached to a civil marriage be sufficient if such desertion were established as would suffice for the purposes of an action for the dissolution of such marriage.

In other words, the Native lobola contract when attached to a civil marriage must be regarded as having been entered into subject to such modifications as are necessitated by the marriage contract to which it is ancillary.

Secondly, the Court must consider the effect of the decree of divorce which was obtained by the appellant against his wife and a certified copy of which was put in during the course of the proceedings. The plaintiff's attorney in taking exception to the defendant's plea denying desertion contended that the effect of the Supreme Court judgment was to estop the defendant from such denial. This exception was, in the opinion of the Court, rightly overruled by the Court below.

All judgments whatever are conclusive proof as against all persons of the existence of that state of things which they actually effect when the existence of the state of things so effected is a fact in issue or is deemed to be relevant to the issue (Stephens Digest of the Law of Evidence Article No.40); and every judgment is conclusive proof as against parties and privies of facts directly in issue in the case, actually decided by the Court, and appearing from the judgment itself to be the ground on which it was based (Stephens Digest of the Law of Evidence Article 41). but a judgment is not as between a party and a stranger evidence of the fact upon which it is founded (vide Taylor S.1667; Phipson on Evidence p.392; Stephens Digest of the Law of Evidence Articles 42 and 44).

In the opinion of this Court the respondent was neither party nor privy but a stranger to the divorce proceedings between plaintiff and his wife and the judgment of the Supreme Court in those proceedings was for the purposes of the present case not only admissible but conclusive evidence of the fact that the plaintiff had obtained a decree of divorce against his wife with forfeiture of benefits of the marriage in community and custody of the child. It was not, however, evidence as against the defendant that that divorce had been obtained on account of the wife's desertion.

If, therefore, desertion on the part of his wife were an essential factor in the case, it became necessary for the plaintiff definitely to establish such and this Court must record its agreement with the view of the additional Native Commissioner that on the evidence in

the present case the plaintiff cannot be regarded as having established such desertion.

Reference to Annexure A to the summons will show, however, that the plaintiff claims the return of the Lobola by reason of his wife's desertion and divorce and it accordingly becomes necessary to consider the further question whether for the purposes of the action he need establish desertion at all or whether he would not under Native law and custom be entitled to a return of the lobola, or proportion thereof, merely by reason of the fact that he has obtained a divorce against his wife, a fact of which, as previously pointed out, the decree is conclusive evidence.

Under pure Native law and custom, it is open to the husband under a customary union to bring any complaint he may have against his wife before the chief and the tribal lekgotla and to claim a dissolution of the customary union. The matter is then enquired into and adjudicated upon by the chief and lekgotla and with certain Native tribes whenever judgment is given in favour of the husband with a dissolution of the union against the wife, no matter on what grounds, whether by reason of her misconduct, desertion or for any other cause, he becomes ipso facto entitled to a refund of the lobola or a proportion thereof.

The plaintiff in the present case is, making due allowance for the fact that in this instance the lobola contract was attached to a marriage and not a customary union, precisely in the same position as the husband who has obtained judgment from the chief and tribal lekgotla against his wife with dissolution of the customary union.

The Court was not aware how far the principle that in every case in which a husband obtains a judgment from a chief or lekgotla against his wife with dissolution of the union he is entitled to a refund of lobola or proportion thereof was operative in the Bakgatla-ba- Makau tribe, and obtained the evidence of three assessors from the tribe on this point.

These assessors are all agreed that in all cases of dissolution where judgment is given in favour of the husband, he is entitled to retain the custody of the children and to the return of lobola.

The appeal in so far as this claim is concerned must accordingly be upheld, and the judgment of the Court below amended to one for Plaintiff as prayed with costs.

In this appeal appellant has succeeded on the main issue and must accordingly be awarded the costs of the appeal.

CASE 17. 1935 (T+N) 66.

ANNIE APPIES VS. WILLEM APPIES.

PRETORIA. 24th September, 1932. Before Howard Rogers, Acting President.

NATIVE .....

NATIVE DIVORCE CASE - Jurisdiction - Claims in connection with divorce.

Plaintiff sued her husband for divorce on the grounds of adultery and claimed division of the joint estate, custody of the minor children and maintenance for them.

THE WORD "SUITS" OCCURRING IN SECTION 10(1) OF ACT 9 OF 1929 ESTABLISHING NATIVE DIVORCE COURTS MUST BE INTERPRETED IN THE WIDE SENSE AS INCLUDING ALL INCIDENTAL AND ANCILLARY MATTERS SUCH AS PROPERTY RIGHTS AND CUSTODY AND MAINTENANCE OF CHILDREN, WHICH UPON TERMINATION OF THE MARRIAGE CONTRACT MUST NECESSARILY BE DECIDED AS BETWEEN THE SPOUSES.

In granting the divorce as prayed Rogers, Acting President remarked:

Mr. Attorney Couzyn has raised the question whether in this case the Court has jurisdiction to deal with the claims for the custody of the minor children and for their maintenance and he bases his contention on the following grounds:-

(1) that this Court is a creature of statute established under the provisions of sub-section (1) of section ten of Act No.9 of 1929 which authorised the Governor-General by proclamation to establish native divorce courts which should be empowered to hear and determine suits of nullity, divorce and separation between natives domiciled within their respective areas of jurisdiction in respect of marriages and to decide any question arising out of any such marriage which is not cognisable by a Native Commissioner's court established under section ten of the Native Administration Act, No.38 of 1927;

(2) that under section ten of the Native Administration Act native commissioners' courts are granted jurisdiction for the hearing of all civil cases and matters between native and native only, except as regards matters in which -

(a) the status of a person in respect of mental capacity is sought to be affected;

(b) is sought a decree of perpetual silence;

(c) namptissement is sought;

(d) the validity or interpretation of a will or other testementary document is in question; or

(e) a decree of nullity, divorce or separation in respect of a marriage is sought.

(3) that claims relating to the maintenance and custody of children are not among those specified above as excluded from a native commissioner's jurisdiction and

are accordingly cognisable by native commissioners' courts; and

(4) that such claims being cognisable by native commissioners' courts are not cognisable by a court, such as this, established under section ten of Act No.9 of 1929, which is given jurisdiction to decide only such questions arising out of any native marriage as are not cognisable by a native commissioner's court.

The cardinal object of interpretation of any law is the discovery of the intention with which the Legislature enacted the statute or of the sense which it attached to the words in which the statute is expressed and the literal meaning of the words is the primary index or clue to the intention or sense of the Legislature. The first rule of interpretation then is to follow the true (i.e. ordinary) sense or meaning of the words utilised by the legislature and not to deviate therefrom where the words speak clearly.

Where, however, the effect of restricting the significance of the words utilised in a statute to their precise ordinary or literal meaning would be to create ambiguity or to reduce the relative provision to an absurdity the court is entitled to enquire furhter into the intention of the law and, if the language utilised is capable of any other construction, to place such a construction upon it as would resolve the ambiguity or eliminate the absurdity and would carry out the general objects of the statute.

It seems clear that in the matter at present under consideration the essential point is what construction is to be placed upon the words "to hear and determine suits of "nullity, divorce and separation between Natives" occurring in sub-section (1) of section ten of Act No.9 of 1929. If the word "suit" as used in the passage quoted is interpreted in the narrow literal sense of "actual issue", the conclusion is inevitable that this court is debarred from deciding any matter in connection with a native matrimonial case other than the actual issue of divorce or judicial separation or nullity as the case may be and can take no cognisance of any ancillary, dependent or associated issue unless, as is extremely unlikely to be the case, such issue happens to be a question in respect of which a native commissioner's court is in terms of section ten of the Native Administration Act, expressly debarred from exercising jurisdiction.

It follows then that this Court would be debarred from dealing with the claim, which very frequently arises in native divorce cases, viz. the necessary preliminary claim in a case of malicious desertion, for the restitution of conjugal rights.

The claim for restitution is entirely separate from the divorce issue itself and in fact originally had to be brought as a separate action and it was only subsequently provided by a special rule of court that in an action for the restitution of conjugal rights the plaintiff may at the same time claim a decree of divorce.

Interpreting ....

Interpreting then the word "suit" in sub-section (1) of section ten of Act No. 9 of 1929 in its strict literal sense we reach the absurd conclusion that in a case of desertion this Court could deal with the actual issue of divorce but has no jurisdiction to deal with the necessary preliminary issue of restitution. This is an obvious absurdity which certainly could never have been intended by the Legislature.

The Court is therefore entitled to consider whether the word "suit" in the sub-section in question cannot carry some other construction which would eliminate the absurdity and be in consonance with the general objects of the statute.

In the opinion of this Court the word is undoubtedly, without any undue strain upon language, capable of such an interpretation. It is frequently used in a general as opposed to a specific sense particularly in relation to matrimonial causes, as connoting not merely the actual issue of divorce or separation between the spouses but also all ancillary, incidental and dependent matters between them arising out of the peculiar relation in which they stand to one another by virtue of their marriage. A divorce suit is generally regarded as including all incidental and ancillary matters upon which termination of the marriage contract must necessarily be decided as between the spouses, such matters as property rights, alimony, the costody and maintenance of children.

The view of the Court is that the word "suit" in sub-section (1) of section ten of Act No. 9 of 1929 is used in this wide or generic sense. This interpretation is entirely consonant with the object of the provision in question, which, it will hardly be disputed, was to provide natives, having regard to their general financial circumstances, with a less expensive forum than the Supreme Court for the settlement of their matrimonial causes. It is unnecessary to add that the object would not be achieved by a provision the effect of which would be to compel natives to deal with their matrimonial causes piece-meal before different courts.

Having regard to what has been said above, it is unnecessary to consider the effect upon the question at issue of the use in sub-section (1) of section ten of the words "and to decide any question arising out of any such marriage "which is not cognisable by a native commissioner's court established under section ten of the principal Act."

The Court accordingly rules that it has jurisdiction to deal with the matters referred to in paragraphs 2, 3 and 4 of the particulars attached to the summons and in paragraph 2 (iii) of the claim in reconvention.

1937 (T.N.) 140.
1947 (") 99
1948 (") 6.

CASE NO. 18.

KISHWAYISE MKIZE vs. TATEZAKE NTULI.

DURBAN. 25th October, 1932. Before Mr. H.C. Lugg, Acting President, E.N. Braatvedt and B.F. Martin, Members of Court.

NATIVE APPEAL CASES - Attachment - Interpleader - Chief's Court.

An appeal from the Court of the Native Commissioner, Eshowe.

WHERE A LITIGANT HAS OBTAINED A JUDGMENT IN A CHIEF'S COURT, THE AID OF THAT COURT SHOULD IN THE FIRST INSTANCE BE INVOKED WHEN SEEKING SATISFACTION OF THE JUDGMENT AND NOT THAT OF THE NATIVE COMMISSIONER'S COURT.

Per LUGG, Acting President.

Appellant sued one Ngazana Ntuli before the Chief's Court and was awarded a judgment, the details of which, however, are not given.

Thereafter the Chief's messenger, acting under this judgment, attached four head of cattle at Respondent's kraal and nine head at another kraal.

Respondent then instituted an action before the Assistant Native Commissioner, ESHOWE, by way of an ordinary summons, for the release of these four head. It was admitted that this attachment was made without previous demand having been made of the original defendant, and that the cattle were attached at Respondent's kraal during his absence. The Commissioner, in supporting Respondent's claim, held, on these facts and without taking evidence, that the proceedings were irregular. He ordered the release of these four head and the other nine as well, citing the case of Caluza vs. Nyongwana 1930 N.P.D. 157 in support of his decision.

The grounds of appeal allege that the proceedings should have been by way of interpleader summons and not by ordinary summons; that evidence should have been led and that the order should have been confined to the four head of cattle only and not to the remaining nine which were not in issue.

Proceedings of this nature are governed by Rule 1 of the Rules of the Courts of Native Chiefs which reads as follows:- "The procedure in connection with the trial "of civil disputes between natives before a chief under section twelve of Act No. 38 of 1927, and the execution of the judgments of the said chief, shall be in accordance with the recognized customs and laws of the tribe to which such chief has been appointed or in respect of which he has been recognised."

This Rule does not provide for interpleader actions in the same way as Rule 36 of the Rules for Native Commissioners' Courts. It will therefore be seen that the Applicant cannot be supported in regard to his contention that the proceedings should have been by way of interpleader. but on his other grounds of appeal he must succeed.

We are of opinion that the correct procedure was for Respondent to have applied to his Chief for relief in accordance with Native Law as indicated in Rule 1 above-quoted and not to have invoked the assistance of the Native Commissioner's Court. If he failed to get redress from his Chief it would then have been competent for him to have taken the matter in appeal before the Native Commissioner.

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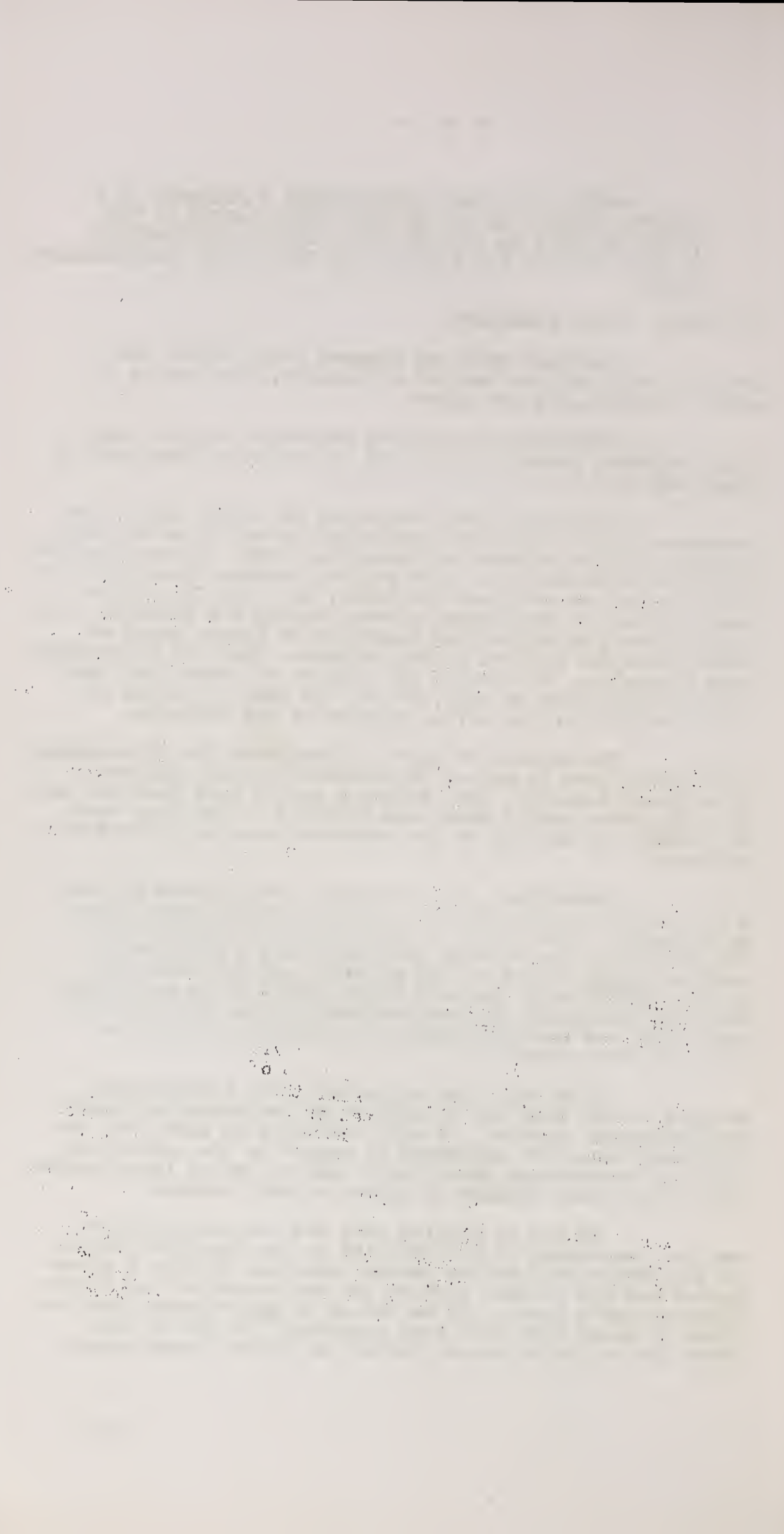

This view is in accordance with the decision in case Ngulube Cele vs. Ngqumo Cele 1929 N.A.C. (N. & T) - not reported - wherein an order by a Native Commissioner in similar circumstances was set aside.

The appeal is accordingly sustained and the proceedings in the lower Court set aside with costs.

CASE NO. 19.

ELIJAH UMLAW vs. PHILLIP SIKAKANE & 23 OTHERS

DURBAN. 26th October, 1932. Before H.C. Lugg, Acting President, E.N. Braatvedt and B.J. Martin, Members of Court.

NATIVE APPEAL CASES - Contract - Verbal agreement - Exceptions - Misjoinder.

An appeal from the Court of Native Commissio er, Stanger.

(1) THAT WHERE A JUDGMENT DETERMINES LIABILITY WITHOUT AWARDING A SPECIFIC AMOUNT, THE FAILURE TO MAKE A SPECIFIC AWARD IS NO BAR TO BRINGING THE MATTER IN APPEAL.
(2) THAT WHERE NO PREJUDICE HAS BEEN SUFFERED, THE CALLING UPON OF DEFENDANT TO GIVE EVIDENCE IMMEDIATELY AFTER PLAINTIFF, DESPITE THE FORMER'S OBJECTION, IS NOT A GOOD GROUND OF APPEAL.
(3) THAT A PLEA OF MISJOINDER CANNOT BE UPHELD WHERE PLAINTIFFS ARE SHEWN TO HAVE DEALT COLLECTIVELY, AND NOT INDIVIDUALLY, WITH DEFENDANT.

This is an appeal from the decision of the Assistant Native Commissioner, Stanger, before whom twenty-four out of thirty purchasers of the farm Subdivision B. of Prospect, jointly sued the vendor thereof (Appellant) for the sum of £172.0.0. alleged to have been collected by the latter as rent from tenants on the property subsequent to its sale to Respondents. The claim is based on an alleged verbal agreement entered into subsequent to the sale.

The record discloses that in the early stages of the case much delay was occasioned by exceptions and arguments on points which in many instances were not relevant to the issue. Of the several exceptions taken the one in respect of jurisdiction has been withdrawn, it having been accepted that a Native exempted from Native Law is subject to the jurisdiction of the Native Commissioner's Court. It is also acknowledged that the subject matter of the present claim is one to which Common Law should be applied.

After the Plaintiffs had called one witness, Appellant was called upon to plead to the summons, and he denied liability; but in doing so, stated that he had been authorised by Respondents to collect the rents for his own benefit. At a later stage in the proceedings it was agreed that the Court should confine itself to the question of Appellant's liability, leaving it to the parties to settle later the amount payable to the Respondents should the finding be in their favour. After three witnesses for the Respondents

/ had...

had given evidence, their Counsel requested that Defendant should now be called in order that the issues might be more readily ascertained. Objection was taken to this course but it was overruled and Appellant's evidence recorded. This ruling forms one of the grounds of appeal and will be dealt with later. Appellant was found liable for rents with costs, but in terms of the agreement come to between the parties during the hearing and to which reference has already been made, no specific award was set out in the judgment.

Mr. Caney took a preliminary objection to the appeal being heard on the grounds that as no specific amount had been awarded the matter could not be heard. The answer to this question depends on the terms of the verbal agreement on which the action is based, and also on the construction to be placed on Section 15 of Act 38/1927. This section gives this Court power to review, set aside, amend or correct any order, judgment or proceeding of a Native Commissioner's Court and we are of opinion that the term "order" occurring in this section includes an order such as the one under notice. The finding of the Native Commissioner was in accordance with the expressed wish of the parties, and by this they were bound; and it seems to us that it was quite competent for the dissatisfied party to appeal to this Court otherwise he would have been left without means of redress. We are therefore unable to support Mr. Caney's exception.

On the question as to whether the Native Commissioner was correct in calling upon the Appellant to give evidence before Respondents has closed their case, it should be stated that it was customary under the old rules in force in Natal to call upon each party to give his evidence before proceeding with the examination of witnesses in order to enable the Court to ascertain the points in issue and to facilitate the trial; and there is much to be said in favour of this procedure. It tended, especially in those cases where no pleadings were filed, to clarify the issue and shorten proceedings. The present rules do not provide for such procedure, but although they are silent, there is nothing in them directly prohobiting the course followed by the Native Commissioner in this case. Although objection was taken, it has not in any way been shown that the defence was prejudiced by it, and in the absence of such prejudice, we are not prepared to interfere. It is recognised, however, that there may be cases where such a method might prove prejudicial, but it is largely a matter dependent on the merits of each case and should be in the discretion of the presiding officer.

Misjoinder forms another ground of this appeal, it being contended that each Plaintiff should have sued the Defendant individually and not collectively as they have done. In dealing with this point it is necessary to consider whether the alleged verbal agreement between the parties brought about such a community of interest as to entitle Respondents to sue Appellant jointly in one and the same action. In our opinion the answer to this question is to be found mainly in the evidence of the Appellant himself. His plea is that he was authorised by the Respondents to collect and use the rents for himself. We also find the following passages in his evidence: "That the question (about the rents) was discussed the day we signed the agreement. We agreed that I should collect the rent on my behalf. After signing the agreement the

Plaintiff.....

Plaintiff purchasers informed me that J.A. Cele would be their mouthpiece in transactions". The word "transactions" here can only refer to the rent because a written agreement which had already been signed had reference to the purchase of the land. The Respondents deny that they dealt individually with Appellant in respect of the rent, and we can draw but one inference from the evidence just quoted and that is, that the purchasers, in authorising Appellant to collect the rents did so in their collective capacity and not individually. We have no hesitation, therefore, in holding that the Native Commissioner was correct in overruling the exception of misjoinder.

When we come to review the evidence as a whole we find that the record has been burdened with lengthy details of legal argument which seem to have obscured the main issues, but that there is sufficient evidence on record to support the Commissioner's finding. Ownership to the property having passed to the purchasers all rents accruing thereafter would, in the absence of any special agreement to the contrary, naturally belong to the Respondents, so that the onus is upon Appellant to prove that he is legally entitled to them.

Apart, however, from a bald statement that he was authorised to collect the rents for himself, he has advanced no grounds in support of his claim, nor has it been shown why the purchasers should have been so generously disposed towards him. It is not suggested that any consideration passed, except that we are led to understand from one of the Respondents that Appellant was to be allowed something for collecting the rents but that the amount was not fixed. It is only reasonable that he should have been allowed something for this work but there is nothing to indicate that the Appellant rendered any other services for which substantial payment might be expected.

We have been advised during the course of the present hearing that the parties have now agreed that in the event of the Native Commissioner's decision being sustained by this Court, the amount collected as rent is to be taken as being £168.12.6. and not £172.0.0. as originally claimed.

Much significance has been attached to a paragraph appearing in a letter written by the secretary, J.A. Cele to Appellant which has been put in marked "L" in which the following passage occurs: "Yet it is not clear what hindered you so much seeing that we allowed you to pick up for yourself whatever was paid as rent by those who have built on the farm, therefore do you not think you could put together what you get from them with our rent and finish up the claim of the children for the 56 acres." This Court is not in a position to offer any explanation on this point because no attempt was made to clear the matter up in the lower Court, but it may have reference to the allowance which Appellant was to receive for collecting the rents, but this is pure conjecture. However, the general tone of this and other letters from Cele has raised considerable doubt in our minds as to his bona fides - as to whether he was not running with the hare and hunting with the hounds - so that we are not prepared to attach much importance to the passage. Had Appellant wished to establish his claim he should have had little difficulty in bringing forward evidence in support of it.

We are therefore not prepared to interfere, and the finding of the Native Commissioner will be confirmed and the appeal dismissed with costs, but the judgment of the lower

Court.....

Court will be amended to one for Respondents (Plaintiffs) for the sum of £168.12.6. and costs.

Costs allowed at the maximum of the scale.

CASE NO. 20.

MAFUKUZA MOLIFE VS. MAMSATYANE MOLIFE.

DURBAN. 3rd November, 1932. Before H.C. Lugg, Acting President, E.N. Braatvedt and B.W. Martin, Members of Court.

NATIVE APPEAL CASES - Defamation - Wives of the same husband.

An appeal from the Court of Native Commissioner, Nqutu.

UNDER NATIVE LAW AN ACTION FOR DEFAMATION BETWEEN WIVES OF THE SAME HUSBAND AMOUNTS TO AN ABSURDITY INASMUCH AS BEING MINORS, THEY MUST BOTH BE ASSISTED BY THE SAME PERSON.

The parties to this action are both wives of Chief Isaac Molife of the Hlubi tribe of Basutos living in Nqutu District, Zululand, Appellant being one of his junior wives and Respondent his chief wife; the latter however lives apart from him.

Appellant sued Respondent before the Native Commissioner for £30 damages for alleged defamation of character by having referred to her as an inyatsi or concubine. The commissioner found, however, that the word nyatsi was not defamatory and merely meant the favoured one, and awarded judgment in Respondent's favour with costs. This decision is now appealed against as a whole but no specific grounds are set out, the parties not having been represented by Counsel in the lower Court.

From the record we are led to understand that Appelland was assisted by her husband and Respondent by one Alfred Molife. Who Alfred Molife is, and what authority he had, if any, for figuring in the case in view of the woman's guardian being her husband, is not clear.

According to Native law both women are minors subject to the control and authority of their husband, and incapable of owning property. Such being the case neither would be capable of satisfying a judgment unless assisted by the husband and he could only do so from his own personal property as the appropriation of house property attaching to either house would mean the enrichment of one house at the expense of another. Any property so used would create a liability for its return.

The institution of these proceedings therefore amounts to an absurdity. It is the first case of its kind that has come within our experience and reflects no credit on Chief Isaac Molife whose duty it is to keep his kraal affairs in order and to discourage litigation between members of his own household. It will be noticed that the chief wife is living apart from him and the whole case smacks of an attempt on his part to oust her from her position and to replace her with his

younger....

younger favourite.

The case should not have been allowed to proceed at all. The position of a married woman under Native Law is such that she and all the property attaching to her house is regarded as belonging to her husband. Consequently she is denied all remedies in respect of civil wrongs committed on her by a fellow wife as the latter is incapable of satisfying any award that might be made against her. Her only remedy would be to invoke the pretection of the criminal courts if the act complained of was sufficiently serious to justify such a course.

It is not unusual for a kraal head to appropriate and slaughter a goat or a beast from the offending wife's house or even to use one of his own for the purpose of making peace between his two wives.

Chapter VIII of the Native Code of 1891 although not applicable to Zululand correctly reflects the personal status of Native women in these matters, and the cases cited at page 55 of Whitfield's Native Law of South Africa also serve as a useful guide.

The appeal will be dismissed with costs.

CASE NO. 21.

ZULONGAPANDHLE ZULU VS. MZITSHANA MNCWANGO.

DURBAN. 3rd November, 1932. Before H.C. Lugg, Acting President, B.W. Martin and H.S. Fynn, Members of Court.

NATIVE APPEAL CASES - Recusation - Criminal record - evidence - excessive damages.

WHERE A NATIVE COMMISSIONER HAS NO PERSONAL INTEREST IN THE MATTER, HE IS JUSTIFIED IN REFUSING TO RECUSE HIMSELF FROM HEARING A CIVIL CAUSE FOUNDED ON A CRIMINAL PROSECUTION IN WHICH HE HAD PREVIOUSLY CONVICTED ONE OF THE PARTIES OF AN OFFENCE AGAINST THE OTHER.

Respondent claimed £100 from Appellant as damages for assault, and was awarded £40 and costs by the Native Commissioner, Nongoma.

The evidence discloses that Respondent was the victim of a very serious assault as the result of which his leg and arm were broken in several places by Appellant with an iron bar. He also received a number of other injuries, was rendered unconscious, confined to his bed for five months and is now incapacitated for life. For this offence appellant was convicted by the same Commissioner and sentenced to six months imprisonment with hard labour.

The Commissioner was asked to recuse himself because of having already tried the criminal case, but this he refused to do, and this forms one of the grounds of appeal. The other main grounds are that the Commissioner was wrong in admitting

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the record of the criminal case and that the damages awarded are excessive.

None of the authorities cited in support of recusation can be regarded as parallel with the present case. The Native Commissioner declares in his reasons that he was not biassed or prejudiced in any way, and in this he is fully supported by the award he gave which in the circumstances indicate very plainly that far from being excessive, he erred, if at all, on the side of leniency. There is nothing to indicate from the proceedings that the Native Commissioner could have had any direct or indirect interest, and the circumstances are such that if this Court were to uphold the contention now advanced it would mean that no Magistrate or Native Commissioner could hereafter adjudicate in any civil claim arising out of a criminal case previously tried by him.

The attitude to be adopted by a Magistrate or a Native Commissioner in a case such as this is well illustrated in Schonken vs. Assistant Magistrate, Pretoria, 1916 T.P.D. 259 cited in "Consolidated Standing Circular Instructions" issued by the Department of Justice and to be found under the heading Magistrates at page 10, and it seems to us that the Native Commissioner in exercising his judicial discretion in refusing to recuse himself conformed to the dictum laid down in this case.

With regard to the second ground, all that happened was that the Clerk of the Court in giving evidence referred to the jacket of the criminal case on which was recorded the nature of the offence, verdict, sentence and date of conviction of appellant, but none of the evidence taken at the trial was admitted; and as there was nothing irregular in this procedure this ground must also fail, as also must the third ground as the award was not excessive.

The appeal will therefore be dismissed with costs.

CASE NO. 22.

MATTHEW GWALATA VS. JOHANNA GWALATA.

PRETORIA. 6th December, 1932. Before H.C. Lugg, President, H. Rogers and J.C. Yeats, Members of Court.

NATIVE APPEAL CASES - Christian marriage followed by customary union - Division of property based on agreement - Amendment of summons.

WHERE A LEGAL MARRIAGE SUBSISTS, A SUBSEQUENT CUSTOMARY UNION ENTERED INTO BY ONE OF THE SPOUSES CAN CONFER NO MARITAL RIGHTS, BUT THE EXISTENCE OF THE CIVIL MARRIAGE IS NO BAR TO AN ACTION BY THE INNOCENT PARTNER FOR THE RECOVERY OF ANY ASSETS OR EXPENDITURE CONTRIBUTED OR INCURRED IN CONNECTION WITH THE CUSTOMARY UNION.

Respondent sued Appellant before the Assistant Native Commissioner, Johannesburg, for a divorce on the grounds, as set out in the summons in its original form,

of adultery alleged to have been committed with a woman named Sophie Mbelekwana in October, 1931, and for the division of the joint estate and costs.

At the trial, and before Appellant was called upon to plead, the summons was amended on the application of Respondent by the deletion of the clause alleging adultery and by the inclusion of a claim to have the customary union declared null and void ab initio on the grounds of having been contracted during the subsistence of a Christian marriage between the Appellant and a woman named Esther, and for the division of the joint estate in terms of an agreement come to by the parties in October 1929 or thereabouts.

Appellant although unrepresented at the time objected, but his objection was overruled and the amendments made accordingly. The reasons for his objecting have not been recorded.

Respondent alleged she had contracted the customary union with Appellant in 1929 without being aware that he was already married by Christian rites. Appellant on the other hand denied having contracted such a union or that an agreement was entered into between them for an equal division of the proceeds of a house, which was the real matter in issue, but which has been described in the summons as the joint estate.

The Commissioner found in favour of Respondent and granted an order declaring the customary union null and void ab initio with division of the property as prayed and costs.

Against this decision appeal has been brought on the following grounds:-

"(1) That the judgment is against the evidence and "that the judgment is against the weight of evidence and "is bad in law.

"(2) That the Acting Assistant Native Commissioner "erred in granting an amendment of the summons in that:-

"(a) He had no power to amend the said summons, "nor had he power to declare the customary "union between Plaintiff and Defendant as "void ab initio, such a declaration being "bad in law and beyond the scope of the "Acting Assistant Native Commissioner's "powers.

"(b) The said amendment prejudiced the Defendant "and introduced an entirely new cause of "action.

"(3) That in view of Defendant's prior Civil Marriage "the Court was incompetent to dissolve the said customary "union as samde does not confer any rights and is void "ab initio.

"(4) That the Court had no power to order a division "of the joint estate in that:-

"(a) No joint estate was created by the said "customary union.

"(b)...

"(b) That the alleged agreement between
"Plaintiff and Defendant was if proved:
"(i) Contra bonos mores.
"(ii) Incapable of conferring any real
"rights in view of the said Civil
"Marriage.

"(5) That the onus of proving any such agreement "as referred to in clause (4) hereof, was on the Plaintiff "and that the Plaintiff has failed to discharge same.

"(6) That such alleged agreement is not based on "any consideration known in law and is either illegal "and/or invalid and/or void.

"(7) That whatever rights are claimed by Plaintiff "are not consequential on the customary union and the "evidence adduced by Plaintiff to support her claim did "not justify the Acting Assistant Native Commissioner in "his finding".

Objection has been taken under Rule 19 of the Rules of this Court to clauses 1, 2, 3, 4 and 6 of these grounds, viz: that the first ground, in that the words "bad in law" being ambiguous, did not conform to the requirements of rule 10(b) of the Native Appeal Court Rules, and that the other grounds could not be advanced as they had not been raised in the Court below.

The objection to these clauses was overruled, the Court holding that the writ of appeal had to be considered as a whole, and as the grounds clearly indicated the legal aspect on which Appellant relied, the objection must fall away; and with regard to the remainder, these could not be supported because there was a clear inference to be drawn from the rule cited that considerable latitude should be allowed to Native litigants who were not represented in the Court below. As Appellant was not then represented it would have been quite competent for him to have simply alleged an appeal against the judgment as a whole as provided by the rule and to have availed himself of every possible ground at the hearing of the appeal, and the fact that he had subsequently engaged counsel did not debar him from setting out these grounds now embodied in the writ. This Court intimated that any ground found to be irrelevant would be struck out.

Coming to the appeal itself, the first point we have been called upon to consider is the objection taken to the amendment of the summons and referred to in ground 2(a) of the writ. It has been contended that the amendment went too far and was prejudicial in that it introduced an entirely new issue, but as has already been pointed out this amendment was made before Appellant was called upon to plead. The only prejudice that could possibly arise in these circumstances would have been due to his inability to prepare his defence on the new issue, which could be met by an adjournment, but there was nothing on record to show that he applied to have the case adjourned. Being an ignorant Native we are not unmindful of the fact that such a course may not have suggested itself to him, but even so, the new issue still turned on his personal conduct in which he would figure as the principal witness, and which, in so far as we are able to judge, would not have involved any material variation from his original line of defence. In the absence, therefore, of evidence to show that the defence was prejudiced we are unable to say that the

Commissioner was wrong in granting the amendment as he did under Rule 27 of his Rules. (See Blaine, p.135).

Regarding the third ground, the Commissioner admits that the union was void ab initio, but contends that he was not barred from declaring it so, and draws a distinction between actions for nullity arising out of marriages which have been expressly excluded from his jurisdiction by section 10 of the Native Administration Act and those arising out of customary unions.

This section provides that Native Commissioners (when constituted as such) have jurisdiction to try all civil cases and matters except those excluded by the section, and it follows thatthe Commissioner did not exceed his jurisdiction in declaring the union a nullity. He was merely giving expression to the legal position as he found it and on which a decision was required by one or other of the parties.

Section 9 of Act 9 of 1929 defines a customary union as meaning "the association of a man and a woman in conjugal relationship according to Native law and Custom where neither the man nor the woman is party to a subsisting marriage", and as the parties were precluded from complying with this definition by reason of one of them having contracted a marriage it followed that the union subsequently entered into was void for want of legality (Emma Mkwanaza & Another vs. Johannes Twala 1929 N.A.C. (N. & T.) 19).

It follows also that no marital rights could flow from such a union, but for all this there was nothing to prevent Respondent from enforcing the agreement for a division of the proceeds of the house if she could prove that it had been entered into, and provided the consideration on which the claim was based was not an immoral one.

To deal with the fourth ground, Respondent avers that she met and married Appellant by customary rites in 1929; that eight head of cattle comprised the lobolo, of which three head were actually paid to her brother Jeremiah, and that she had a child by Appellant which died. She also declares that she assisted him with money and labour in building the house, but that she was unaware then that Appellant was a married man. On this evidence she is corroborated by her sister.

Appellant called no witnesses, but it is on record that he had one to call.

Respondent informs us that she subsequently discovered that Appellant was cohabiting with another woman. They then quarrelled and separated but later they both went to the Superintendent of the Location and before him agreed to sell the house and to divide the proceeds equally between them. This agreement forms the basis of her whole claim. There is nothing in the evidence to suggest that it was based on an immoral consideration.

From these circumstances it will be seen that no joint estate was created, nor could any marital rights flow from it, and that the plea of contra bonos mores must fail

as .....

as there is no evidence to support such an allegation. Grounds 5, 6 and 7 must likewise fall away.

Coming to the facts which are covered by the first ground of appeal, two documents marked A and B were put in through Respondent. They are applications submitted to the Location authorities in connection with Stand 1885-6, Klipspruit Location, on which was erected the house in dispute. Both documents bear the signature of Appellant, and were put in through Respondent who was present with him, as she alleges, when they were made out. Appellant admits that he signed document A but denies knowledge of document B although it also purports to bear his signature.

The Commissioner regards the evidence of Appellant in regard to these documents as unsatisfactory and certainly it is.

The most important piece of evidence, however, centres round the alleged agreement made before the Location Superintendent. The Native Commissioner states he did not call this witness because he did not consider his evidence necessary. He accepted the evidence of Respondent and refused to believe Appellant whom he describes as an unsatisfactory and evasive witness. He may have been right in the attitude he adopted, nevertheless had the evidence of the Superintendent been taken, - and it was available, - it would have removed all doubts and definitely disposed of the case one way or the other. Its absence has created a doubt in the minds of this Court, and made it difficult for us to come to a satisfactory decision.

Again there is nothing to show that Appellant (Defendant) had closed his case. On the contrary we are faced with the fact that he had a witness whom he wished to be called.

Being a Native and unrepresented it was incumbent on the Commissioner to exercise particular care to see that he was afforded every opportunity of calling his witnesses and of presenting his side of the case, but there is nothing on record to show why the proceedings terminated at the stage they did.

The ommission amounts to an irregularity which calls for our intervention and must be remedied.

The judgment will accordingly be set aside and the case remitted for the evidence of the official from the Location Superintendent's office together with such other evidence as either party may wish to adduce; and thereafter for the Native Commissioner to give judgment in the light of such evidence.

Costs of this appeal will be costs in the cause before the Native Commissioner.

CASE 23 ....

1936 (C.O) 69.
1938 (T&N) 241, 255.
1939 (") 45.
1948 (") 24.

CASE 23.

IDA MOHULATSI VS. PHANUEL & BEN MOHULATSI.

PRETORIA. 7th December, 1932. Before H.C.Lugg, President H. Rogers and J.C. Yeats, Members of Court.

NATIVE APPEAL CASES - Native Estate - Claims against - Administrative and not judicial matter.

An appeal from the Court of the Additional Native Commissioner, Rustenburg.

A DISPUTE OR QUESTION ARISING OUT OF THE ADMINISTRATION OR DISTRIBUTION OF AN ESTATE FALLING TO BE ADMINISTERED ACCORDING TO NATIVE LAW, OR WHERE THE DECEASED HAD BEEN MARRIED BY CHRISTIAN RITES AND DIED INTESTATE, MUST BE DEALT WITH BY A NATIVE COMMISSIONER IN HIS ADMINISTRATIVE CAPACITY AND NOT BY JUDICIAL PROCEEDINGS IN A NATIVE COMMISSIONER'S COURT.

This case has been brought on appeal from the Court of the Additional Native Commissioner at Rustenburg before whom it was in turn brought as an appeal from a judgment of the Court of Chief A. Mabalane of the Baphiring tribe at Mabaalstad.

The matter came before the Chief in the First instance in the form of an application by Ida Mohulatsi the Appellant, who claimed to be the heir to the estate of her late father Joseph Mohulatsi, for the delivery to her of the assets in that estate by her uncle Fanuel Mohulatsi in whose possession they were. The Chief then called the brothers of the late Joseph and the various members of the Mohulatsi family before himself and the lekgotla and proceeded to hear and determine the issue. During the proceedings certain claims were advanced against the estate by the respondents viz: for £29.10. 0. by Fanuel, a claim for £25 by Ben and a claim to certain land by Nicodemus.

The Chief ordered the asserts in the estate to be handed over to Ida, and lessened the claims of respondents Nos. 2 and 3. He apparently dismissed Fanuel's claim as well, in spite of the fact that it was admitted by Ida that her late father owed Fanuel the sum of £10. The exact purport of his judgment is so far as Fanuel was concerned is, however, not altogether clear.

The Chief gave judgment on the 7th June, 1932, and an appeal to the Court of the Additional Native Commissioner was noted on the 18th July following, that is after the lapse of the period of thirty days prescribed under rule 5 for Chiefs' Civil Courts. This point was not, however, raised in the Court of the Additional Native Commissioner, who proceeded to hear and determine the various issues "de novo".

Now it is quite clear that the matter as originally

brought ...

brought before the Chief was a dispute or question arising out of the Administration or distribution of the estate of the late Joseph.

Subsection (4) of Section twenty-three of the Native Administration Act, No.38 of 1927, provides that:

"Any dispute or question which may arise out of the "administration or distribution of any estate in "accordance with Native law shall be determined by the "Native Commissioner, or where there is no native commis- "sioner by the Magistrate of the district in which the "deceased ordinarily resided, or in respect of immovable "property by the Native Commissioner or, where there is "no Native Commissioner, by the Magistrate of the district "where such property is situate, and every dicision of a "Native Commissioner or Magistrate under this section "shall be subject to an appeal to the Native Appeal "Court hereinbefore referred to, and the decision of such "Court shall, save as is provided in sections fourteen "and eighteen , be final."

It will be noted that the subsection refers specifically to the Native Commissioner and not to the Native Commissioner's Court whereas subsection (5) relating to claims and disputes arising out of the administration of any estate of a deceased Native, where any party to such a claim or dispute is not a Native, specifically provides that such shall be decided in an ordinary Court of competent jurisdiction.

It seems clear, therefore, that "Native Commissioner" as used in subsection (4) means the Native Commissioner acting in his administrative capacity and not the court of the Native Commissioner.

This conclusion is placed beyond a doubt by the provisions of section 2(3) of the regulations for the administration of Native estates framed under section twenty-three of the Act and published under Government Notice No.1664 of 1929, which lay down that in the case of a dispute the Native Commissioner shall summon before him the parties concerned and such witnesses as he may consider necessary and shall summarily and without pleadings determine the issue; and also by the special provision for appeals contained in the concluding portion of Section 23(4).

It follows, therefore, that neither a Chief's Court nor a Native Commissioner's Court has jurisdiction to determine a matter which falls within the purview of subsection (4) of section twenty-three of the Native Administration Act.

If, therefore, Joseph's estate fell to be administered under Native Law the Chief's Court had no jurisdiction whatsoever to deal with Ida's application nor for that matter did the Court of the Additional Native Commissioner.

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The whole trend of the record indicates that Joseph's estate falls to be administered under Native law though this is nowhere expressly shown. This would, of course, be the case if during his lifetime Joseph did not contract a lawful marriage and if he died intestate.

Assuming however that he had been married according to Christian rites and died intestate, the position would be that, in terms of paragraph (b) of section two of the regulations published under Government Notice No.1664 of 1929 the property must devolve as if he had been a European and must in terms of section three of the regulations be administered under the supervision of the Native Commissioner who must administratively enquire into and determine any dispute or question which may arise concerning the administration and distribution of the estate.

Here again the jurisdiction of both the Chief's and the Native Commissioner's Courts is definitely ousted.

Assuming that Joseph died leaving a valid will his estate would, in terms of subsection (9) of Section twenty-three of the Native Administration Act No.38 of 1927, as amended by section seven of Act No.9 of 1929, fall to be administered and distributed in all respects in accordance with the Administration of Estates Act, No.24 of 1913, i.e. under the ordinary statutory law. In this case, again, obviously the Chief would have no jurisdiction to deal with the matter seeing that a Chief's jurisdiction under section twelve of the Native Administration Act is restricted to claims arising out of Native law and custom.

Thus, whatever were the circumstances as regards the late Joseph, it is clear that the Chief had no jurisdiction to deal with the matter; that the proceedings in his Court were entirely irregular and that the Additional Native Commissioner should simply have set them aside and then taken steps to determine the matter himself in his administrative capacity, or in the event of its being ascertained that Joseph had left a valid will to have reported the estate to the Master of the Supreme Court.

This Court accordingly finds that the proceedings in both the Chief's and the Additional Native Commissioner's Courts were entirely irregular and orders that they be set aside.

Under the circumstances, there will be no order as to costs.

CASE 24. 1937(T.N.)40.

JAMES GOBA VS. JONES MTWALO.

PRETORIA. 10th December, 1932. Before H.C.Lugg, President, H. Rogers and J.C.Yeats, Members of Court.

NATIVE .....

NATIVE APPEAL CASES - Recovery of money lent - Interest - Prescription - Act 26, 1908 (T) - Application of common law . Illegality of contract.

An appeal from the Court of Native Commissioner, Benoni.

WHERE A LITIGANT RESISTS A CLAIM FOR REPAYMENT OF A LOAN WITH INTEREST ON THE GROUND THAT INTEREST IS UNKNOWN TO NATIVE LAW, HE CANNOT THEREAFTER SUCCESSFULLY APPEAL ON THE GROUND THAT THE DEBT IS PRESCRIBED.

Respondent claimed £6. and £1.5.8d. interest thereon, being balance of a loan of £8. made to Appellant in 1928 to secure his release from a conviction under the Liquor Act.

Appellant, who was unrepresented by counsel in the Court below, pleaded prescription or alternatively that the transaction was illegal.

The Native Commissioner deferred his decision on the first point as he states, "pending proof of demand during 1930 and 1931 as alleged in the summons", and overruled the second exception for lack of precision.

Mr. Franks, who has since appeared for Appellant, contends that as Sec. 12(b) of Act 26, 1908 (T) provides that prescription may only be interrupted by an act amounting to an admission of liability and not by demand, the Commissioner's ruling was based on wrong premises. He has also drawn attention to the fact that there is nothing to indicate in the record that a definite ruling was eventually given on this point.

But this argument cannot find support. It is quite clear from the Commissioner's reasons that he based his judgment on the admissions as alleged in the summons and as established by the evidence, and not upon the fact that demand had been made by Respondent for the recovery of the money due to him.

On the second ground it has been contended that Respondent was involved in the criminal proceedings which led to Appellant's conviction under the Liquor Act, but this allegation has also been rejected by the Commissioner whose conclusions we find are fully justified by the evidence.

Mr. Franks has also advanced the further point that as interest is unknown to native law this item should have been disallowed as there was no stipulation for its payment, and he has referred us to the case of Watruss and Winter vs. Xoyeya 1923 E.D.C. 310; but in that case interest was claimed on an account rendered and not on a loan or contract of Mutuum as in the present case.

But apart from this, the contention that interest being unknown to Native Law, this item, in the absence of

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an express agreement for its payment, should have been disallowed, is also untenable, because Appellant in relying on prescription as one of his main grounds of appeal - a plea unknown to Native law - at once placed the case within the ambit of Common Law and precluded the applic tion of Native law quite apart from any other considerations. Having pleaded prescription under Common law he now attempts under Native law to resist the claim for interest, but he cannot have it both ways.

This being so, it follows that the Common Law principle must apply that interest is claimable on a loan, in the absence of an agreement, from the date onwhich the borrower is in mora - (Maasdorp Vol.III 3rd Ed. p.126).

The claim for interest, calculated at the rate of six per cent per annum for a period of forty-three months from February, 1939, is therefore recoverable.

The appeal will be dismissed with costs.